Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit sitting *en banc* entered on July 8, 1974. The judgment reversed the order of the District Court for the District of New Jersey which dismissed respondent's complaint and denied his application for a preliminary injunction.

The judgment of the Court of Appeals, which was issued in lieu of a formal mandate, directed the District Court to conduct an evidentiary hearing and set forth its conclusions in the form of a declaratory judgment.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit sitting *en banc* has not yet been reported and appears in the Appendix (A5, *et seq.*). The prior opinion of the three judge panel of the Court of Appeals for the Third Circuit has not yet been published and appears in the Appendix (A43, *et seq.*). The oral opinion of the District Court for the District of New Jersey dismissing respondent's complaint and denying preliminary injunctive relief also appears in the Appendix (A61, *et seq.*).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. A three judge panel of the Court of Appeals for the Third Circuit thereafter reversed the District Court's order on September 10, 1973. On September 21, 1973, the Court of Appeals granted petitioners' application for a rehearing. Subsequently, the Court, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, and at petitioners' request, consented to a consideration of the matter *en banc.*

The judgment in lieu of a formal mandate was issued by the Court of Appeals for the Third Circuit *en banc* on July 8, 1974. Petitioners' application for a recall of the mandate was granted on July 23, 1974. Issuance of the mandate was stayed until August 7, 1974, to permit petitioners to file this petition for a writ of certiorari.

Questions Presented

1. Whether the "extraordinary circumstances" exception to the *Younger* v. *Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution in the absence of an allegation of "harassment" or "bad faith"?

2. Whether the New Jersey Supreme Court's inquiry into respondent's intention to continue to serve as a member of the judiciary during the pendency of a grand jury investigation pertaining to his activities constituted such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution?

3. Whether federal intervention in a pending state criminal prosecution was permissible where the courts of the State of New Jersey were fully capable of fairly adjudicating respondent's constitutional claims?

4. Whether the Fifth Amendment privilege against self-incrimination is violated where lawful governmental processes have the unintended effect of overbearing an individual's will and causing him to testify?

5. Whether federal intervention was permissible to enjoin a pending state criminal prosecution on charges of false swearing on the ground that allegedly compelled testimony formed the basis for the criminal prosecution?

6. Whether federal intervention in a pending state criminal prosecution was permissible to resolve factual disputes in advance of constitutional necessity in the absence of an allegation of great, immediate and irreparable injury?

Constitutional Provisions and Statutes Involved

Constitution of the United States, Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution. . . ."

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

Constitution of the United States, Amendment XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 1:

> "The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court. In case the Chief Justice is absent or unable to serve the presiding Justice designated in accordance with rules of the Supreme Court shall serve temporarily in his stead."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 2:

> "The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 3:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

N.J.S.A. 2A:1B-1:

> "2A:1B-1 Definitions
>
> 'Judge' as used herein means any judge of the superior court, county court, county district court, juvenile and domestic relations court and municipal court."

N.J.S.A. 2A:1B-2:

> "2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence."

N.J.S.A. 2A:1B-3:

> "2A-1B-3. Institution of removal proceedings
>
> A proceeding for removal may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."

N.J.S.A. 2A:1B-4:

"2A:1B-4. Prosecution of removal proceedings

The Attorney General or his representative shall prosecute the proceeding unless the Supreme Court shall specially designate an attorney for that purpose."

N.J.S.A. 2A:1B-5:

"2A:1B-5. Suspension pending determination

The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days."

N.J.S.A. 2A:1B-6:

"2A:1B-6. Preparation of defense; counsel; production of witnesses and evidence

The judge shall be given a reasonable time to prepare his defense and shall be entitled to be represented by counsel. The prosecuting attorney and the judge shall have the right of compulsory process to compel the attendance of witnesses and the production of evidence at the hearing."

N.J.S.A. 2A:1B-7:

"2A:1B-7. Taking of evidence

Evidence may be taken either before the Supreme Court sitting *en banc*, or before three justices or judges or a combination thereof, specially designated therefor by the Chief Justice."

N.J.S.A. 2A:1B-8:

"2A:1B-8. Rules governing

Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court."

N.J.S.A. 2A:1B-9:

"2A:1B-9. Removal

If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office."

N.J.S.A. 2A:1B-10:

"2A:1B-10. Suspension prior to hearing

No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel."

N.J.S.A. 2A:1B-11:

"2A:1B-11. Impeachment proceedings

The actions of the Supreme Court may not extend further than removal from office, but proceedings under this act shall not preclude the institution of impeachment proceedings against a judge pursuant to Article VII, Section III of the Constitution or subjecting a judge to such criminal or penal proceedings as may be authorized by law."

N.J.S.A. 2A:131-4:

> "2A:131-4. False swearing; offense stated
>
> Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable for a misdemeanor."

New Jersey Rules of Evidence, Rule 8(3):

> "In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. . . ."

New Jersey Rules of Evidence, Rule 63(10):

> "A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution."

New Jersey Court Rules, R. 1:12-1:

> "Rule 1:12. Disqualification and Disability of Judges
>
> 1:12-1. Cause for Disqualification; On the Court's Motion
>
> The judge of any court shall disqualify himself on his own motion and shall not sit in any matter, if he
>
> (a) is by blood or marriage the second cousin of or is more closely related to any party to the action;
>
> (b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, employees or office associates of any such attorney except where the Chief Justice for good cause otherwise permits,
>
> (c) has been attorney of record or counsel in the action; or
>
> (d) has given his opinion upon a matter in question in the action; or
>
> (e) is interested in the event of the action; or
>
> (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.
>
> Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because he has given his opinion in another action in which the same matter in controversy came in question or given his opinion on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or the municipality in which he is a resident or liable to be taxed are or may be parties to the record or otherwise interested."

New Jersey Court Rules, R. 1:12-2:

> "1:12-2. Disqualification on Party's Motion
>
> Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

New Jersey Rules of Court, R. 1:12-3:

> "1:12-3. Proceedings in the Trial Courts in the Event of Disqualification or Inability
>
> (a) Before or After Trial; Designation. In the event of the disqualification or inability for any reason of a judge to hear any pending matter before or after trial, another judge of the court in which the matter is pending or a judge temporarily assigned to hear the matter shall be designated by the Chief Justice or by the Assignment Judge of the county where the matter is pending except that in the municipal court, the disqualified or disabled judge shall himself in writing designate the acting judge, subject to the Assignment Judge's approval, if the designee is not himself a judge of a municipal court.
>
> (b) During Trial. If a judge is prevented during a trial from continuing to preside therein, another judge may be designated, as provided in paragraph (a), to complete the trial as if he had presided from its commencement, provided, however, that he is able to familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof.
>
> (c) Disposition in the Interest of Justice. No substituted judge shall continue the trial in any matter

> pursuant to this rule unless he is satisfied, under the circumstances, that he can fairly discharge his duties, and if not so satisfied, he shall make such disposition as the circumstances warrant, as where trial has taken place, by ordering a new trial or, in a case tried without a jury, by directing the recall of any witness.

Statement of the Case

This is a petition for a writ of certiorari to review a decision rendered by the Court of Appeals for the Third Circuit sitting *en banc* reversing an order of the United States District Court dismissing respondent's complaint and denying his application for preliminary injunctive relief. Three judges dissented. The judgment issued in lieu of a formal mandate was recalled and stayed pending certiorari proceedings.

The material facts are not in dispute and are essentially a matter of official record. Respondent Helfant, a member of the New Jersey Bar and a former municipal court judge,[1] alleged in a verified complaint (see 18 U.S.C. §1343(3) and 42 U.S.C. §1983) that he was subpoenaed to appear before the State Grand Jury on October 18, 1972. The allegation under investigation by the grand jury concerned a criminal complaint for atrocious assault and battery upon two victims lodged in a municipal court in which Judge Samuel Moore presided. Respondent allegedly represented one of the victims and

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[1] In New Jersey, municipal court judges may practice law and need not devote their full time to their official duties. See N.J.S.A. 2A:8-8 and R. 1:15-1(c). However, they may not practice in any "criminal, quasi-criminal or penal matter." R. 1:15-1(c).

caused the complaint to be filed against one John Cantoni for the purpose of extracting money from him. The charge of atrocious assault and battery being an indictable offense,[2] the municipal court had no jurisdiction to hear the matter,[3] and could dismiss the complaint only with the consent of the County Prosecutor. Nevertheless, the complaint was dismissed without the Prosecutor's knowledge, after Cantoni paid an intermediary $1,500, plus an additional $200 allegedly for Judge Moore.

Pursuant to the subpoena, respondent appeared before the State Grand Jury on October 18, 1972, and was advised that he was the target of an investigation.[4] Armed with that information and pursuant to his attorney's advice, respondent invoked his Fifth Amendment privilege against self-incrimination and refused to testify. Nevertheless, respondent Helfant's appearance before the grand jury and his possible involvement in the pending investigation received some public notoriety and was dis-

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[2] N.J.S.A. 2A:90-1.

[3] In New Jersey, municipal court judges have jurisdiction to conduct probable cause hearings. If probable cause is found to exist, the defendant is "bound over" to await final determination of the cause. R. 3:4-3.

[4] Unlike many jurisdictions, New Jersey case law provides that a witness who is a target of a grand jury inquiry must be apprised of that fact. See, *e.g.*, *In re Addonizio*, 53 N. J. 107, 117, 248 A.2d 531, 536 (1968); *In re Boiardo*, 34 N. J. 599, 604-06, 170 A. 2d 816, 818-20 (1961); *State* v. *DeCola*, 33 N. J. 335, 350-52, 164 A. 2d 729, 736-37 (1960). When a witness is thus a target, no more need appear to support his Fifth Amendment claim. *In re Addonizio*, *supra*, at 117, 248 A. 2d at 536; *State* v. *Fary*, 19 N. J. 431, 438-39, 117 A. 2d 499, 503-04 (1955).

closed in several newspapers in the State. When the news account appeared, the Administrative Director of the Courts in accordance with settled practice informed the Supreme Court. The Administrative Director was then instructed to obtain a report from the Deputy Attorney General handling the matter and all relevant grand jury testimony.[5] The material was obtained and it revealed in substance the allegations against Judge Helfant and Judge Moore recounted above.

In the meantime, it had become apparent that the grand jury's investigation encompassed other matters in which respondent was involved. Shortly after his initial appearance, respondent was again subpoenaed to testify before the grand jury at 10:00 A.M. on November 8, 1972. The Supreme Court had scheduled oral arguments on pending appeals for that date. Thus, the Court directed the Administrative Director to ask both Judge Helfant and Judge Moore to meet with it at its private conference room on that day. The purpose of this meeting was to discuss with the two judges whether they should sit pending resolution of the grand jury investigation. Both of them appeared as requested and each met separately with the Court. Both Judge Helfant and Judge Moore agreed not to sit in their respective courts until the completion of the grand jury investigation and the resolution of any charges which might emerge.[6] Their agreement not to sit obviated the need to consider whether formal proceed-

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[5] Under New Jersey law, grand jury minutes are in the exclusive custody of the judiciary. See, *e.g.*, *In re Jeck*, 26 N. J. Super. 514, 98 A. 2d 319 (App. Div. 1953).

[6] In his testimony before the United States District Court, Helfant said: "I am a municipal court judge in two municipalities but I have taken a voluntary leave of absence from both judgeships."

ings should be instituted for their interim suspension. Although no order of their suspension was entered, the records of the courts show that neither man sat in his official capacity following the meeting of November 8, 1972.

The federal complaint filed by Helfant alleged isolated incidents with respect to the meeting with the Supreme Court, but did not attempt to indicate their context. More precisely, respondent did not reveal the purpose of the meeting so that its significance could be evaluated. Candor required of one who seeks equitable relief surely demanded that Helfant either disclose the stated purpose or allege that none was revealed if it be so claimed. Yet, although respondent alleged that when he was asked to meet with the Court, he tried unsuccessfully to learn from the Administrative Director the purpose of the meeting, he did not allege that he was not so advised by the Supreme Court. Nevertheless, that he was told that the purpose was to discuss whether he should continue to sit pending the disposition of the charges is inferable from the allegation in the complaint that Chief Justice Weintraub said the Court was not interested in hearing from Helfant the merits of the underlying controversy.

In any event, according to the allegations in the complaint, respondent was ushered into the Supreme Court's conference room where all of the justices were assembled. Chief Justice Weintraub inquired of respondent whether he thought it proper for a judge sitting in criminal cases to invoke the Fifth Amendment privilege against self-incrimination.[7] This was followed by a question pro-

[7] Chief Justice Weintraub has since retired as have two other justices who were present at the conference. Thus, only four of the seven justices who were present at the conference with Helfant are presently members of the Supreme Court.

pounded by Justice Mark A. Sullivan as to whether respondent had continued to preside following his invocation of the Fifth Amendment. Justice Sullivan also asked whether respondent felt it appropriate to adjudicate the rights of others when he had refused to testify regarding his own activities.

Although respondent's complaint alleged that both Chief Justice Weintraub and Justice Sullivan inquired into his prior assertion of the Fifth Amendment, he did not allege that any member of the Court suggested that he testify or offered any promise or threat if he did or did not testify. The Fifth Amendment was not the focus of the meeting. Judge Moore, who had already testified freely before the grand jury, and Judge Helfant who had not, were dealt with in precisely the same fashion. Both agreed not to sit. Nor did respondent ask to be relieved of that agreement after he testified before the grand jury, thus making it evident that nothing turned upon whether he chose to speak or be silent. Thus, respondent said in an affidavit annexed to the complaint, "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment."

The complaint referred to other questions concerning Helfant's association with one Abe Schusterman, a State's witness who had previously appeared before the grand jury. The focus of this inquiry related to allegations that Helfant and Schusterman had bribed an Atlantic County Court judge in a criminal case. As previously noted, Chief Justice Wientraub cautioned respondent not to discuss the merits of the Attorney General's investigation. The import of the Chief Justice's remarks was that he was solely concerned with respondent's ability to

continue to actively serve as a municipal court judge during the pendency of the grand jury investigation. Resonent informed the Court that he intended to cooperate with the grand jury and to testify. Helfant alleged in his complaint that petitioner, Joseph Hayden, who was conducting the grand jury investigation, entered the Supreme Court chambers as he was leaving.

Immediately following this conference, respondent proceeded to the grand jury room where he waived his Fifth Amendment privilege and responded to questioning. According to the complaint, Helfant was "emotionally upset" by virtue of his prior confrontation with the Supreme Court justices and testified only because he feared that he would otherwise be removed from office and disbarred. As previously noted, he admitted, however, that none of the justices had threatened to take disciplinary action against him unless he waived his Fifth Amendment privilege. In any event, the import of respondent's testimony was wholly exculpatory. Nevertheless, the grand jury subsequently returned an indictment charging respondent with conspiracy to obstruct justice (N.J.S.A. 2A:98-1), obstruction of justice (N.J.S.A. 2A:85-1), compounding a felony (N.J.S.A. 2A:97-1) and four counts of false swearing (N.J.S.A. 2A:131-4).

Based upon these allegations, respondent sought a preliminary and a permanent injunction enjoining the Attorney General and others from prosecution of the indictment. Respondent's request was grounded upon his conclusory allegation of collusion between the Supreme Court and the Attorney General's Office. The Supreme Court's interest in the outcome of his case, according to Helfant, prevented him from having his constitutional claims fairly adjudicated in the State system and precluded the possibility of a fair trial.

Petitioners moved pursuant to Rule 12(b)(6), *Fed. R. Civ. P.*, to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court thereafter conducted an evidentiary hearing with respect to respondent's motion for a preliminary injunction. Following respondent's presentation of evidence, the district court denied injunctive relief and dismissed the complaint for failure to state a claim. Noting that federal intervention was impermissible under the guidelines of *Younger* v. *Harris,* 401 U. S. 37 (1971), the court concluded that the prosecution was not instituted in bad faith or for the purpose of harassment and that respondent was not threatened with immediate or irreparable injury. Significantly, the district court found that respondent's constitutional claim could properly be adjudicated by the New Jersey judiciary. Specifically, the district court concluded that the involvement of members of the New Jersey Supreme Court in respondent's disciplinary proceedings did not impair their ability to fairly consider the merits of the pending criminal prosecution. Further, the court was unwilling to presume that other members of New Jersey's judiciary would be infected by the Supreme Court's alleged interest in respondent's case. The court thus found it unnecessary to resolve the issue of whether respondent's testimony before the grand jury was the product of his free and unconstrained will.

A three judge panel of the Court of Appeals reversed the district court's order on September 10, 1973, and remanded for further proceedings. Citing the inability of the New Jersey Supreme Court to impartially resolve respondent's constitutional claim, the order dismissing the complaint and denying respondent's application for injunctive relief was vacated. The case was remanded to the district court for a hearing on respondent's motion for a preliminary injunction, and for a trial on

the merits. The court's conclusion was bottomed upon an assumption that the Supreme Court's prior involvement in respondent's case prevented the State courts from resolving the issues raised. Lacking a forum in the State courts, the Court concluded that respondent's allegation of coercion could only be decided by the federal judiciary.

Petitioners thereafter petitioned the Court of Appeals to recall its mandate and applied for rehearing suggesting that the matter be heard *en banc*. See Rules 35 and 40, *Fed R. App. P.* Because of the significant federal-state comity questions raised in petitioners' application, the full Court of Appeals subsequently agreed to hear the case *en banc*. On July 8, 1974, the Court reversed the district court's order, three judges dissenting. Although rejecting respondent's application for an injunction, the majority directed that the case be remanded to the district court "for the entry of an order temporarily enjoining" the trial of the State indictment and for "a determination of whether [respondent's] testimony before the grand jury" was coerced. In reaching this conclusion, the majority opinion did not distinguish between the substantive offenses and the false swearing charges contained in the indictment. Presumably, the Court concluded that a finding of "involuntariness" by the district court would preclude the prosecution of respondent for false swearing and would prevent the State from introducing the alleged tainted testimony at trial. In any event, the court directed the district court to conduct an evidentiary hearing and to set forth its conclusions in the form of a declaratory judgment. This petition followed.

Summary of Argument

The Court of Appeals' *en banc* decision tears at the very roots of "Our federalism." Its effect is to paralyze the administration of a state judicial system and disrupt its criminal processes. At stake is the prerogative of a state to administer effectively its laws. It goes without saying, federal interference of this magnitude is inherently abrasive. *Younger* v. *Harris,* 401 U. S. 37 (1971).

This case presents the novel question of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris, supra.* Specifically, at issue is whether the "extraordinary circumstances" exception to the *Younger* interdiction was intended to establish a distinct category justifying federal intervention in a pending state criminal prosecution, or to be merely descriptive of the traditional standards of "bad faith" or "harassment." This Court has never delineated the contours of the "extraordinary circumstances" exception and scattered statements seem to indicate doubt on the part of some justices that such a distinct class exists. See, *e.g.,* Mr. Justice Black's opinion in *Perez* v. *Ledesma,* 401 U. S. 82, 85 (1971) and Mr. Chief Justice Burger's opinion in *Allee* v. *Medrano,* —— U. S. ——, ——, 42 *U.S.L.W.* 4736, 4745-4749 (1974). If a separate category exists at all, it must be equated with the unavailability of a state forum for vindication of the claimed constitutional deprivation. See Mr. Justice Brennan's opinion in *Perez* v. *Ledesma, supra* at 93.

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state criminal prosecution. On this basis alone, the issues raised in this petition are highly significant and

are worthy of this Court's review. Assuming the existence of such a separate category, the majority grievously erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention. Alternatively, if the majority opinion is read to mean that the factual involvement of the Supreme Court would destroy the objectivity of the entire State court system in processing respondent's constitutional claims the decision is clearly incorrect. So interpreted, the court's decision reveals a substantial misunderstanding of the Supreme Court's constitutional and statutory obligations and the manner in which these duties are discharged. Plainly, there was nothing ominous in the Supreme Court's conference with respondent. The purpose of that meeting was to determine whether respondent intended to sit as a municipal court judge during the pendency of the grand jury's investigation into his activities. It is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. See *Constitution of New Jersey,* Article 6, Section 2, paragraph 3; N.J.S.A. 2A:1B-1 *et seq.* The Court's duty to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. It is consonant with that obligation to decide whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to invite the judge's (or the attorney's) view as to whether a suspension would be self imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed. The mere fact that the Supreme Court is duty-bound to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Further, it is a slur on the entire State judicial system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the State courts do not provide, in appearance and in fact, a proper forum for vindication of respondent's constitutional claims.

Even assuming the wholesale contamination of New Jersey's judicial system, the court below nevertheless erred. Respondent's complaint failed to allege a constitutional injury that was "both great and immediate." See *Younger* v. *Harris, supra* at 46. A crucial aspect of *Younger's* limitation upon incursions into state proceedings has thus not been satisfied. The equity jurisdiction of the federal courts may not be invoked to permit a flanking movement against the system of state courts. See *Stefanelli* v. *Minard,* 342 U. S. 117 (1951); *Fenner* v. *Boykin,* 271 U. S. 240 (1926).

Federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Younger* v. *Harris, supra* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized doctrine has its genealogy in traditional precepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey,* 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence,* 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an in-

tegral part of the doctrine of federal non-intrusion. Principles of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise boundaries that separate two co-equal judiciaries; this because there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded upon solely conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. There is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. What must be stressed is that we are dealing not with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona,* 384 U. S. 436, 466 (1966)), or create a "Hobson's choice" for an individual, does not necessarily render the procedure violative of due process. *Id.* at 467.

Even if there is a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. *Glickstein* v. *United States,* 222 U. S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U. S. 77, 82 (1969); *Bryson* v. *United States,* 396 U. S. 64 (1969); *Dennis* v. *United States,* 384 U. S. 855 (1966); *United States* v. *Kahriger,* 345 U. S. 22, 32 (1952). Assuming coercion, the compulsion is not to testify falsely, but to testify truthfully. Any other rule would reduce a witness' oath to a meaningless shibboleth. Hence, a finding of coercion would not affect trial on those counts in the indictment charging respondent with false swearing.

With respect to the substantive charges, it is to be emphasized that respondent's testimony before the grand jury was not incriminatory. Therefore, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. Equally important is the Attorney General's stipulation before the Court of Appeals that he would not seek introduction of respondent's grand jury testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, respondent has suffered no harm in the *Younger* sense with respect to the criminal prosecution,

and in fact, no harm at all. In short, his claimed Fifth Amendment violation bears no relevance to the State prosecution.

It bears repeating that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for even significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment privilege. See 28 U.S.C. §2254(d). Thus, respondent is not without a federal forum for resolution of his constitutional claim.

Rather, at issue is the sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, to be weighed is the right of the state courts to try state cases free of federal interference against the interest of the citizen to immediate disposition of his federal constitutional claims by a federal court. The tension between these competing interests can best be alleviated by declining to permit federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy." (A37). Substantial interests of federalism are thus sacrificed not in

the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the decision offends basic considerations of comity. It is respectfully submitted that these significant issues require this Court's review.

REASONS FOR GRANTING THE WRIT

The New Jersey Supreme Court's inquiry into whether respondent should continue to serve as a member of the judiciary during the pendency of a grand jury investigation pertaining to his activities did not constitute such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution.

A. Introduction.

This case epitomizes the ever-increasing tension between the state and federal courts. At stake is the traditional power of the state judiciary to effectively administer the criminal law, and to ensure the integrity of its bench and bar. That authority has been placed in jeopardy by virtue of respondent's conclusory allegation that members of the Supreme Court of New Jersey will, at some future time, refuse to obey the law they are constitutionally bound to enforce. Based upon that allegation, the Court of Appeals ordered the district court to conduct an evidentiary hearing and to determine whether the Supreme Court's inquiry into whether respondent should sit pending resolution of the grand jury investigation, conducted pursuant to its constitutional mandate, violated his Fifth Amendment privilege against self-incrimination. Suffice it to say, the Court of Appeals' decision is, in and of itself, an unwarranted interference with the efficient operation of the

State's judiciary.[8] Its conclusion, standing alone, is inherently abrasive and has an enormous impact on the entire State judicial system, for it seriously impairs the independence of the New Jersey Supreme Court and threatens its ability to faithfully discharge its constitutional obligations.

The court below itself recognized the significance of the "federal-state comity questions" presented in this case (A7). It sought to minimize the precedential value of its decision, however, noting that "the operative facts" were peculiar to the State of New Jersey, where its Constitution vests in the Chief Justice and the State's highest court the total and complete administrative control over the entire judicial system (A22). The court further observed that the factual allegations contained in respondent's complaint were *sui generis* and in all likelihood would not recur (A22). The Court thus characterized the impact of its holding as "miniscule" and foresaw no future cases receiving much "precedential nourishment" from its opinion (A23).

Petitioners are constrained to disagree. Even were the court correct in its assumption that New Jersey's judicial system is indigenous to that State,[9] the injury

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[8] Pursuant to the Court of Appeals' remand, respondent has subpoenaed members of the New Jersey Supreme Court to testify at the district court hearing.

[9] The incidence of such constitutional provisions is not, in fact, limited to New Jersey. Eight states vest plenary administrative authority over judicial officers in the Chief Justice of the state's highest court: *Alaska, Const., Art.* IV, §16; *Arizona, Const., Art.* 6, §3; *Colorado Const., Art* VI, §5(2); *Delaware Const., Art.* 4, §13; *Florida, Const., Arts.* 2 and 5; *Hawaii, Const.,*

(*Footnote continued on following page*)

would be no less acute because it affects but one of fifty jurisdictions. Nor was the court correct in assuming that the factual pattern which emerged in this case might not be a recurring one. In New Jersey, the Supreme Court is duty-bound to inquire into allegations of judicial misconduct; and these investigations do not generally await the conclusion of pending and related criminal charges.[10] Simply stated, there exists a strong likelihood of continued federal intervention. The majority opinion thus sets an unwholesome and dangerous precedent which warrants this Court's review.

(*Footnote continued from preceding page*)

Art. 5, §5; *Illinois, Const. Art.* 6, §16; *Oklahoma, Const.* VII, §6. Nine states vest in the Chief Justice the power to temporarily assign or transfer at will subordinate judicial officers to any court within the state system: *Alaska, Const., Art.* IV, §16; *Colorado, Const., Art.* VI, §5(3); *Florida, Const., Art.* 5, §12; *Illinois, Const., Art.* 6, §16; *Missouri, Const., Art.* V, §6; *North Carolina Const. Art.* IV, §9; *Pennsylvania, Const. Art.* V, §15 (limited to assignment of retired judges); *Washington Const., Art.* IV, §2(a). The Oregon Constitution authorizes such transfers but requires enacting legislation. *Oreg. Const., Art.* VII, §2(a). The Arizona provision is similar to New Jersey's and is not limited to temporary assignments. *Arizona Const., Art.* VI, §3. Ten state constitutions provide for direct Supreme Court involvement in removal, suspension and disciplinary proceedings against judicial officers: *Alabama Const., Art.* VII, §§173, 174; *Alaska Const., Arts.* 4 and 10 (see also A. S. §22.30,070); *California Const., Art.* VI, §§16, 106; *Colorado Const., Art.* VI, §23; *Delaware Const., Art.* IV, §37; *Florida Const., Art.* V, §12; *Indiana Const., Arts.* 4 and 7; *Kansas Const., Arts.* 3 and 15; *Louisiana Const., Art.* IX, §§1, 5; *Texas Const., Art.* XV, §6

[10] The court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a related criminal case. Actual prosecution of ethics charges, however, generally does not commence until the criminal prosecution has run its course.

The decision below erodes longstanding principles of comity and federalism. It is well settled that our federal system contemplates a policy which permits state courts to try criminal cases free from interference by the federal judiciary. *Younger* v. *Harris,* 401 U. S. 37, 46 (1971). Many and varied considerations support this well-recognized doctrine. Basic to the rule is the principle that courts of equity should not restrain a criminal prosecution where an adequate remedy at law exists and no irreparable injury would obtain. Within the bounds of the Constitution, limited federal equitable jurisdiction prevents "erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the [federal] rights asserted." *Id.* at 44. Vital among the considerations determinative of equitable jurisdiction is the concept of comity, "that is, a proper respect for state functions. . . ."[11] *Id.* at 45. In essence, an accused should be compelled to rely upon his defenses in the state courts, *"unless it plainly appears that [this] course would not afford adequate protection."* *Fenner* v. *Boykin,* 271 U. S. 240, 244 (1926) (emphasis added). See also *Samuels* v. *Mackell,* 401 U. S. 66, 72 (1971). Stated another way, "a pending state proceeding, in all but unusual cases . . . provide[s] the federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . . ." *Steffel* v. *Thompson,* —— U. S. ——, 42 *U.S.L.W.* 4357, 4360 (1974). Thus, apart from the traditional prerequisite to obtaining an injunction, *i.e.,* irreparable injury, the "fundamental policy against federal interference with state criminal prosecutions requires the additional showing that the irreparable harm be both great and immediate." *Younger* v. *Harris, supra* at 46. "[T]he threat to the plaintiffs' federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 47. In short, there must be an allegation that the state prosecution was undertaken in bad faith or for purposes of harassment, or that "other unusual circumstances" exist which would justify federal interference, and that the constitutional harm sought to be averted is both "great and immediate." *Id.* at 54. See also *Perez* v. *Ledesma,* 401 U. S. 82, 85 (1971).

[11] The policy against federal interference with state functions is deeply rooted in our history. It bears repeating that our union was established by thirteen uneasy states fearful of national encroachment upon their independence. The national government received an assigned role dependent upon specific constitutional authorization. All else was reserved to the states. As noted in Judge Adams' dissenting opinion, the first formal expression of the "*Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued 'to stay proceedings in any court of a state.' " (A 24-25). See 1 Stat. 335, the forebearer of 28 U.S.C. §2283. Although suits entertained under the Civil Rights Act form an exception to the proscription contained in the anti-injunction statute (see *Mitchum* v. *Foster,* 407 U. S. 225 (1972)), section 2283 represents a long standing public policy against federal interference in state proceedings.

B. The "Extraordinary Circumstances" Requirement.

Perhaps the single most salient feature of this case is that the prosecution of respondent "grew out of an ongoing State Grand Jury [i]nvestigation into alleged acts of misconduct initiated prior to the incidents" alleged in the complaint (A62). It is conceded that neither bad faith nor harassment were present in Helfant's prosecution.[12] Nevertheless, the majority concluded that the New

[12] "Bad faith" and "harassment" signify that a prosecution is being instituted or threatened with no reasonable hope or expectation of obtaining a valid conviction. *Perez* v. *Ledesma supra* at 85. Under such circumstances, it is plain that the federal plaintiff's constitutional rights cannot be vindicated in the state criminal trial. *Ibid.* See also *Dombrowski* v. *Pfister,* 380 U. S. 481, 486, 490 (1965).

Jersey Supreme Court's disciplinary investigation which immediately preceded respondent's appearance before the grand jury constituted such "extraordinary circumstances" as to compel federal intervention in a pending state criminal prosecution (A20). This case thus presents the novel question of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris*, *supra*. Specifically, at issue is whether the "extraordinary circumstances" exception to *Younger's* interdiction was intended to establish a distinct category justifying federal intervention, or whether this Court intended the phrase to be merely descriptive of the traditional standards of "bad faith" or "harassment." In any event, this Court has never delineated the contours of the "extraordinary circumstances" exception. As noted in the dissenting opinion, "scattered statements by the Court seem to indicate doubt on the part of some of the justices that any such exception exists at all" (A34). See, *e.g.*, Mr. Justice Black's opinion in *Perez* v. *Ledesma*, *supra* at 85. See also Chief Justice Burger's opinion in *Allee* v. *Medrano*, —— U. S. ——, 42 *U.S.L.W.* 4736, 4745-4749 (1974).

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state prosecution. On this basis alone, this Court should review the decision below. Even assuming the existence of such a category, however, the court erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the Supreme Court, such grounds manifestly do not warrant federal intervention. Plainly, the federal question is whether the State courts provide a proper forum for resolution of respondent's claim. In petitioners' view, the "extraordinary circumstances" finding of the majority must be predicated on the claim that the State judicial system could not vindicate respondent's federal constitutional rights. Assuming that the New Jersey courts are capable of fairly adjudicating the issues relating to respondent's guilt or innocence, the federal inquiry ends. The mere appearance of impropriety does not present a federal question.

Distilled to its essence, the majority opinion adopted respondent's contention that "the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire State court system in processing his constitutional claim." (A15). The majority opinion is thus premised upon the astounding presumption that the entire State judiciary would in some vague way be infected by virtue of the Supreme Court's inquiry whether respondent should continue to preside pending resolution of the grand jury investigation. More shocking, however, is the unwarranted conclusion that this presumption of predisposition exists without any consideration of the motivation of the State Supreme Court in conducting its conference with respondent. Even if respondent's will was overborne and he was thus "coerced into testifying," there can be no presumption of partiality or bias absent a showing of some malevolent intent on the part of the members of the Supreme Court. Succinctly stated, respondent's complaint is barren of any allegation supporting the assumption entertained by the majority that the State courts do not provide an effective forum for resolution of the constitutional claims asserted here.

Plainly, there was nothing ominous in the Supreme Court's conference with respondent. New Jersey's Con-

stitution[13] and statutory law[14] confer broad administrative responsibility on the Supreme Court to insure public confidence in the bar and the bench. The Chief Justice serves as the "administrative head" of the court system and assigns and transfers members of the judiciary to the various divisions and parts. *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. As a matter of state practice, all disciplinary actions are initiated and supervised by the Supreme Court. *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Moreover, removal or suspension of a member of the judiciary lies in the sole province of the Supreme Court. See, *e.g.,* N. J. S. A. 2A:1B-3; N. J. S. A. 2A:1B-7; N. J. S. A. 2A:1B-9. And significantly, "the Constitution [and statutory law] place the administrative control of

[13] The New Jersey Constitution vests in the Chief Justice the power to temporarily assign Superior Court judges to the Supreme Court. *Constitution of New Jersey,* Article 6, Section 2, paragraph 1. The Supreme Court has jurisdiction "over admission to the practice of law and the discipline of persons admitted." *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. In addition, the Supreme Court makes rules governing practice and procedure and exercises appellate jurisdiction "in the last resort in all causes provided in [the] Constitution." *Constitution of New Jersey,* Article 6, Section 2, paragraphs 2 and 3.

[14] The constitutional authority to discipline, suspend or remove members of the judiciary is supplemented in statutory provisions. The Supreme Court may institute removal proceedings "on its own motion." N.J.S.A. 2A:1B-3. Removal may be based upon "misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence." N.J.S.A. 2A:1B-2. The Attorney General is to prosecute proceedings for removal. N.J.S.A. 2A:1B-5. In all instances, the defending judge has the right to counsel, compulsory process and other constitutional protections guaranteed by the Fourteenth Amendment. See, *e.g.* N.J.S.A. 2A:1B-6, 7, 8 and 9.

the municipal court in the Supreme Court and the Chief Justice." See *Kagan* v. *Caroselli,* 30 N. J. 371, 379, 153 A. 2d 17, 21 (1959). See also *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Thus, the Supreme Court "is charged with responsibility for the overall performance of the judicial branch. . ." and this broad grant of authority includes the "power reasonably necessary" to fulfill its constitutional and statutory obligations. *In re Mattera,* 34 N. J. 259, 264, 168 A. 2d. 38, 45 (1961). See also *State* v. *DeStasio,* 49 N. J. 247, 253, 229 A. 2d. 636, 639 (1967), *cert.* denied 389 U. S. 830 (1967).

The mere fact that it is incumbent on the New Jersey Supreme Court to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Certainly, a judicially disciplined mind is able to remain impartial. *Cf. American Trial Lawyers Ass'n* v. *New Jersey Supreme Court,* 409 U. S. 467 (1973). See also *United States* v. *Grinnell Corp.,* 384 U. S. 582, 583 (1966); *Napolitano* v. *Ward,* 457 F. 2d. 279, 282 (7th Cir. 1972); *DeVita* v. *Sills,* 422 F. 2d. 1172 (3d Cir. 1970). Further, it is a slur on the entire State judicial system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the entire State judicial system is morally and ethically bankrupt.

The Supreme Court's obligation to the bench, the bar and the public, grounded in the State Constitution and statutory law, cannot await formal indictment, trial and conviction. See *DeVita* v. *Sills, supra.* The Court's obligation to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. While these inquiries may

serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed.

Here, for example, allegations of abuse of office had been publicly aired, and it was incumbent upon the State Supreme Court to determine whether respondent intended to preside in his official capacity during the pendency of the Attorney General's investigation. As is evident from its inquiry, the Court's concern was focused upon its fear that public respect and confidence in the judicial process would be diminished by virtue of respondent's continued participation as a judge during the pendency of a grand jury inquiry into his own activity. In his complaint respondent alleged no intent on the part of the Supreme Court to affect the grand jury proceedings, or to compel him to testify. Nor does the fact that the conference occurred immediately prior to the respondent's scheduled appearance before the grand jury support an inference of any interest on the part of the members of the Supreme Court in the outcome of the Attorney General's criminal investigation.

The majority below recognized the importance of maintaining both the appearance and fact of judicial integrity[15] (A20). The Court further alluded to the well recognized policy of judicial restraint based upon "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. . . ." *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951) (A18). Parodoxically, the Court concluded that both objectives could best be advanced by federal

[15] Quoting Lord Herschell, the majority noted "[i]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they are geting it" (A 20). See R. Pound, "Mechanical jurisprudence," 8 *Colum. L. Rev.* 605, 606 (1928).

intervention in a criminal prosecution pending in the State court (A21). According to the majority, "[s]uch limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the 'brooding omnipresence' of the New Jersey Supreme Court" (A21).

Despite the majority's assertions to the contrary, the decision below in no way serves the interests of comity. Rather, it connotes a lack of confidence in the State judiciary. The majority opinion is predicated upon an assumption that members of the Supreme Court (1) will be predisposed against respondent, (2) that they will not disqualify themselves pursuant to settled New Jersey practice, (3) that they will utilize their broad administrative powers to coerce other State court judges, and (4) that the entire State judiciary will be intimidated by their interest in the outcome of the case. This far-fetched scenario taxes one's credulity.

C. The "Great and Immediate" Harm Requirement.

We now turn to the second requirement of *Younger* v. *Harris, supra;* namely that federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Id.* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized doctrine has its genealogy in traditional percepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey*, 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence*, 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an integral part of the doctrine of federal non-intrusion. Prin-

ciples of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise line that separates the jurisdiction of the two co-equal judiciaries. It bears repeating that our national Constitution calls for judicial parallelism and not federal paramountcy. That is not to denigrate the federal judiciary's responsibility to protect and to safeguard the constitutional rights of our citizens. Plainly, the federal judiciary is supreme and the state judicial system is subordinate in resolving federal constitutional questions. But there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded upon solely conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. We submit that there is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. As such, the complaint fails to set forth any constitutional injury, much less one that is both "great and immediate." But even if there is a triable issue as to coercion, there is no basis to say

that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. Hence, a finding of coercion would not affect trial on those counts in the indictment charging Helfant with false swearing. Further, since respondent's testimony before the grand jury was not incriminatory, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, Helfant has suffered no harm in the *Younger* sense with respect to the criminal prosecution, and in fact, no harm at all. In short, his claimed Fifth Amendment violation bears no relevance to the State prosecution.

1. Justiciability of the Coercion Issue.

The judgment of the Court below requires the district court to determine whether respondent's "testimony before the State Grand Jury, given on November 8, 1972, was the product of a free and unconstrained will" (A4). Petitioners take it to be evident that the issue is not whether Helfant's "will" not to testify was overcome by official inquiry into his criminal involvement, or the consequences which might lawfully ensue if he chose not to speak. What must be shown, rather, is that Helfant was "coerced" by the New Jersey Supreme Court by virtue

of some unlawful act or unconscionable promise. Surely, one who decides to testify before a grand jury or a petit jury, in the hope that he will not be indicted or convicted, cannot say his Fifth Amendment privilege was denied because the State was pursuing him in accordance with the discharge of its duty to enforce the criminal law. Nor can it be said that every judge and every lawyer who chooses to testify can assert that his free will was overcome because the Supreme Court of the State holds the responsibility to remove, suspend or disbar. Nor would the judge's or the lawyer's position be strengthened if he added his belief that the justices of the Supreme Court would privately regret a plea of the Fifth Amendment by an individual so situated. Nor could the claim be given efficacy by a gratuitous fear that the members of the State Supreme Court would surreptitiously or corruptly impose some penalty in violation of their oaths of office.

The essence of a claim that a waiver was involuntary is not that the individual was persuaded by circumstances to conclude that the less onerous course was to speak, but rather that government extorted the waiver by some misbehavior. Clearly, the mere existence of the removal or disciplinary powers cannot be found to constitute "coercion" no matter how overwhelmed a judge or an attorney may say he is because of the existence of the Court's constitutional responsibility. It would be extraordinary indeed to say that such an allegation creates a basis for federal interference with removal or disbarment proceedings.

In his complaint respondent alleges that he was asked to meet with the Supreme Court. There is nothing inherently wrong in that procedure. As pointed out, it is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the

misbehavior of judges and attorneys. The Court's duty to preserve the appearances and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. See *De Vita* v. *Sills, supra.*[16]

It is consonant with that obligation to decide whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to invite the judge's (or the attorney's) view as to whether a suspension would be self imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed. And, although the complaint charges communications between the Supreme Court and the Deputy Attorney General handling the grand jury investigation, there is nothing evil or extraordinary in this procedure. Such communications are routine whenever the question of the fitness of a judge (or a lawyer) comes to the attention of the Court. Surely the complaint adds nothing of legal moment when it characterizes such communications as "collusive."[17]

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[16] In that case, the Court of Appeals for the Third Circuit recognized this obligation and approved the State mechanism for disciplinary matters. Yet, in the case now before this Court, the majority opinion below disavowed this conclusion, apparently determining the procedure to be inherently ominous. In the petitioners' view, the decision below has thus raised a constitutional question as to every disciplinary matter which coincidentally involves a criminal investigation or prosecution. The effect of the decision, in sum, is to preclude the State Supreme Court from exercising its constitutional responsibility.

[17] In New Jersey, the grand jury is an arm of the Superior Court, and responsibility for its administration lies with the judiciary. See *e.g., In re Jeck,* 26, N.J.Super. 514, 98 A.2d 319 (App. Div. 1953).

What must be stressed is that we are dealing not with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona*, 384 U. S. 436, 466 (1966)), or create a "Hobson's choice" for an individual, does not necessarily render the procedure violative of due process.[18] *Id.* at 467.

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[18] The context of the Supreme Court's inquiry here was not facilitation of the criminal investigation but the protection of the judicial system from public ridicule. This undisputed fact is critical since the main purpose of the Fifth Amendment is to prevent overbearing by governmental agencies.

The desire to obtain a conviction can lead to overzealous activity and abuses of power. Through the Fifth Amendment, the framers of the Bill of Rights sought to avoid such abuses in the seeking of confessions. This purpose is made evident by an examination of the history behind the Fifth Amendment.

> "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. (citations omitted). Certainly anyone who reads accounts of those investigations . . . cannot help but be sensitive to the framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination 'was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Michigan* v. *Tucker*, —— U. S. ——, ——, 94 S. Ct. 2357, 2361-62 (1974).

It is thus clear that the Fifth Amendment is meant to protect citizens against the use of unlawfully obtained evidence and to protect against governmental overreaching. It is to this latter consideration that this Court has most frequently turned its atten-

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tion. See *e.g., Michigan* v. *Tucker, supra; Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Jackson* v. *Denno*, 378 U. S. 368 (1964); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Rochin* v. *California*, 342 U. S. 165 (1952); *United States* v. *Carignan*, 342 U. S. 36 (1951).

The original common law rationale for the exclusion of involuntary confessions was that they were inherently untrustworthy. Thus, the voluntariness concept was strictly a principle of common law evidence based on the premise of exclusion of probably, or perhaps only possibly, untrue inculpatory statements which, by reason of their dramatic nature, are likely to have a decisive effect on the trier of facts. The underlying psychological basis of this ratoinale has been questioned for there is doubt whether there is a substantial danger of false confessions when coercion has been exerted. Professor McCormick perhaps the leading proponent of this contention arrives at this conclusion employing reasoning as follows:

> "If we revert, however, to our first inquiry as to whether the danger of false confessions is substantial enough, beyond the danger of untruth in out of court statements generally, to warrant the special rules restricting the admissibility of confessions the answer certainly cannot be a confident 'yes'. It may well be doubted whether confessions of guilt, even where they are extorted by pressure of force or fear, are not reasonably trustworthy . . . . Accordingly, it seems clear that while the policy on which all rules of competency are founded, the policy of safeguarding the trustworthiness of evidence admitted, has had an ancillary role in shaping the rules restricting the admission of confessions, the predominant motive of the courts has been that of protecting the citizen against the violation of his privilege of immunity from bodily manhandling by the police and from other undue pressures described [as] the third degree." McCormick, *Evidence*, §109, p. 229 (1954).

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For further authority supporting this thesis see McCormick, *The Scope of Privilege in the Law of Evidence,* 16 *Texas L. Rev.* 447, 451, 457 (1938); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 *Texas L. Rev.* 239, 245 (1946); Allen, "Due Process and State Criminal Procedures: Another Look," 43 *N. W. U. L. Rev.* 16, 19 (1953); Maguire, *Evidence of Guilt,* 109 (1959); Note, 63 *Michigan L. Rev.* 381 (1964); Note, 31 *U. Chi. L. Rev.* 313, 320 (1964).

In 1936, the voluntariness doctrine was raised to constitutional rank in the landmark case of *Brown* v. *Mississippi,* 297 U. S. 278 (1936), which held that it was a clear denial of due process guaranteed by the Fourteenth Amendment to admit into evidence a defendant's confession which had been tortured from him by State officials. The *Brown* Court reasoned that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which be at the base of all our civil and political institutions." *Id.* at 286. See also *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964). See cases collected in 3 Wigmore, *Evidence,* §820(D), p. 306, fn. 1 (*Chadbourn Rev.* 1970). The rationale of this constitutional doctrine does not relate to the trustworthiness or reliability of the statement as evidence. "[T]he reliability of a confession has nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne." *Jackson* v. *Denno,* 378 U. S. 368, 385 (1964).

In 1944 this Court decided *Ashcroft* v. *Tennessee,* 322 U. S. 143 (1944) and in every confession case since then (with one exception) the deterrence rationale has been the primary component in the Court's "complex of values" test. The exception was *Stein* v. *New York,* 346 U. S. 156 (1953) wherein this Court seemed to revert back to the trustworthiness rationale. "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."

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Id. at 192. This approach to the problem however proved to be short lived as a constitutional principle and its ultimate demise was foreshadowed eight years later when this Court decided *Rogers* v. *Richmond,* 365 U. S. 534 (1961). Justice Frankfurter, writing for the Court, spoke directly to the trustworthiness and deterrence concepts:

> "[C]onvictions following the admission into evidence of confessions which are involuntary, *i.e.,* the product of coercion, either physical or psychological cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial system and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth [citations]. To be sure, confessions cruelly extorted may be and may have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed." *Id.* at 540-541.

When this Court decided *Jackson* v. *Denno* three years later it rejected the premise that "the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession" and expressly overruled *Stein*. *Id.* at 383 and 391. In *Jackson* it was again made clear that the constitutional concept of voluntariness was rooted in the deterrence theory expounded in *Rogers,* and the concept was further explained later in the following words:

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Certainly, not every "compelling" influence leading to an individual's decision to testify violates the Fifth Amendment privilege. Numerous pressures necessarily come to bear on an individual whose activities are the subject of governmental investigation. The very fact of the investigation, or the apparent proofs adduced, may influence an individual to alter an intention to remain silent. So, too, that formal criminal charges may be imminent may well "compel" the "accused" to lay bare the details of his defense or to offer an explanation for his conduct. Suffice it to say, the resulting "compulsion" may spring from a wide variety of sources, including social, professional and familial pressures. The federal Constitution is not offended by the revelation of criminal conduct under such circumstances, or by a judgment that continued silence is not in the accused's best interest.[19]

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"It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' [citing *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960)] and because of 'the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York*, 360 U. S. 315, 320-321 (1959); *Jackson* v. *Denno*, *supra* at 385-386.

[19] Plainly, the issue "must be resolved in terms of balancing the public need on one hand, and the individual claims to constitutional protection on the other." See plurality opinion by Mr. Chief

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Justice Burger in *California* v. *Byers*, 402 U. S. 424, 427 (1971). As aptly stated by Mr. Justice Harlan:

> "If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices." *Id.* at 453.

And as noted by a majority of this Court in *Harrison* v. *United States*, 392 U. S. 219, 222 (1968), "[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him."

So too in *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970), this Court said:

> "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments."

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Similarly, in *McGautha* v. *California*, 402 U. S. 183, 213 (1971), against the backdrop of a contention that a unitary trial penalized a defendant who wanted to testify as to punishment but not as to the issue of guilt this Court said:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments as to which course to follow. *McMann v. Richardson*, 397 U. S. (759) at 769, 90 S. Ct. (1441), at 1448, 25 L. Ed. 2d (763) at 772. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. Analysis of this case in such terms leads to the conclusion that petitioner has failed to make out his claim of a constitutional violation in requiring him to undergo a unitary trial.
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> * * *
>
> "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.
>
> Further, a defendant whose motion for acquittal at the close of the Government's case is denied must decide whe-

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Simply stated, there is no triable issue of coercion presented in this case. Helfant disavowed, under oath, any claim that any member of the Court directed him to waive the Fifth Amendment or made any threat in that regard. What remains, at most, is a fear that the justices would somehow be faithless to their constitutional duty, a fear unsupported by any allegation of impropriety. When the complaint is carefully scrutinized, no more emerges than that the New Jersey Supreme Court was acting in the good faith exercise of its constitutional responsibility. We submit on the basis of respondent's complaint, the issue of "coercion," *i.e.*, improper pressure on Helfant, is not raised. Surely, if some vestige of such a conclusory assertion is thought to be inferable, the supporting allegations are too flimsy to warrant federal intervention in a pending state prosecution by the extraordinary remedy of injunction. See *e.g.*, *Robinson* v. *McCorkle*, 462 F. 2d 111, 114 (3d Cir. 1972), *cert.* denied 499 U. S. 1042 (1972); *Coopersmith* v. *Supreme Court*, 465 F. 2d 993, 994 (10th Cir. 1972).

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> ther to stand on his motion or put on a defense with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty."

See discussion of these cases in *State* v. *Falco*, 60 N.J. 570, 292 A. 2d 23 (1972).

Distinguishable are such decisions as *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Grosse* v. *United States*, 390 U.S. 62 (1968), *Haynes* v. *United States*, 390 U.S. 85 (1968), *Leary* v. *United States*, 395 U.S. 6 (1969) and *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). The holdings in all of these cases were based on the fact that the laws in question were directed at a class of persons who were suspected of criminal activity and whose compliance with the requisite statutes would immediately expose them to prosecution. The State's disciplinary procedures at issue here are not directed to those suspected of criminal activity and certainly are not designed to compel them to incriminate themselves.

2. *Effect of Coercion on the False Swearing Counts.*

The authorities overwhelmingly hold that the Fifth Amendment does not authorize perjury or false swearing, and hence it is no defense that a waiver of the Fifth Amendment privilege was coerced. We will presently discuss these authorities at length. We are at a loss, however, to understand the majority's handling of this issue. The dissenting opinion expressly agreed with our position. The majority opinion nevertheless was silent. We think it incomprehensible that the majority would silently decide that issue against the State; and this for two reasons. The first is that the majority could hardly ignore the wealth of authority laid before it. If it meant to disagree, it would surely say so and why. Secondly, since the dissenting opinion spoke directly to the issue, and at some length, the majority would be expected to say something about it. Yet, if we are correct, there is no discernible basis for interfering in any way with the trial of the false swearing counts. As we noted above, upon receiving the opinion, we sought to elicit the majority's position by moving to vacate the stay on the trial of the false swearing counts on the basis we have stated. Our motion was denied without any statement. We submit that there is no basis for a stay on those counts.

Even assuming that the Supreme Court's conference with respondent had the effect of coercing him into testifying, and that the State courts could somehow be considered incapable of adjudicating issues pertaining to this alleged "misconduct," the Court of Appeals was nevertheless in error in intervening in the pending prosecution for false swearing. Since the question of coercion is, as a matter of law, irrelevant to the issues to be considered at trial, it is equally apparent that such a claim could not affect or infect the "aura" of the State criminal proceedings. Conceding for the purpose of argument

the wholesale contamination of New Jersey's judiciary, respondent has suffered no direct injury which would support federal equitable relief. That is true because the issue of coercion need never be presented to the State judiciary.

In determining the impact of a coercion defense to an indictment charging false swearing it is relevant to examine the scope of the Fifth Amendment privilege. That Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. "[I]t does not . . . reach forward to protect against incrimination for future acts." *In re Baldinger,* 356 F. Supp. 153, 162 (C. D. Cal. 1973).[20] In no sense is Fifth Amendment protection extended to perjured testimony. The privilege "does not endow the person who testifies with with a license to commit perjury.[21] *Glickstein* v.

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[20] New Jersey law is in accord. See *State* v. *Falco,* 60 N.J. 570, 292 A.2d 23 (1972); *State* v. *Williams,* 59 N. J. 493, 284 A.2d 272 (1971).

[21] Other courts both state and federal, have held that untruthful testimony is not protected by the Fifth Amendment privilege. See *United States* v. *Hockenberry,* 474 F. 2d. 247 (3d Cir. 1973); *United States ex rel. Annunziato* v. *Deegan,* 440 F. 2d 304 (2d Cir. 1971); *Robinson* v. *United States,* 401 F. 2d. 248, 251 (9th Cir. 1968); *United States* v. *Orta,* 253 F. 2d. 312, 314 (5th Cir. 1958), *cert.* denied 357 U. S. 905 (1958); *Claiborne* v. *United States,* 77 F. 2d. 682, 690 (8th Cir. 1935); *United States* v. *Provienzano,* 326 F. Supp. 1066, 1067 (E. D. Wis. 1971); *United States* v. *Ponti,* 257 F. Supp. 925 (E. D. Pa. 1966); *Moyer* v. *Brownell,* 137 F. Supp. 594, 605 (E. D. Pa. 1956); *United States* v. *Haas,* 126 F. Supp. 817 (E. D. N. Y. 1954); *United States* v.

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United States, 222 U. S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U. S. 77, 82 (1969); *United States* v. *Kahriger,* 345 U. S. 22, 32 (1952). Thus, in *Bryson* v. *United States,* 396 U. S. 64, 72 (1969), this Court characterized as unthinkable the "principle . . . [that] a citizen has a privilege to answer fraudulently a question that the government should not have asked." There, it was noted that our "legal system provides methods for challenging the government's right to ask questions" and that

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Miller, 80 F. Supp. 979 (E. D. Pa. 1948); *People* v. *Tomasello,* 21 N. Y. 2d. 143, 234 N. E. 2d. 190, 192-93 (Ct. App. 1967); *Cf. United States* v. *Wilcox,* 450 F. 2d. 1131, 1141 (5th Cir. 1971), *cert.* denied 405 U. S. 924 (1971); *Kronick* v. *United States,* 343 F. 2d. 436, 441 (9th Cir. 1965); *United States* v. *Parker,* 244 F. 2d. 682, 690 (7th Cir. 1957), *cert.* denied 355 U. S. 836 (1959); *United States* v. *Cason,* 39 F. Supp. 731, 734 (W. D. La. 1941); *Cf. United States* v. *Di Michele,* 375 F. 2d. 959, 960 (3d Cir. 1967). *Contra*: *People* v. *Allen,* 15 Mich. App. 387, 166 N. W. 2d. 664 (Ct. of App. 1968). In *Allen,* police officers were subpoened to testify before a judge who was conducting an investigation into police corruption. Defendants were advised of their constitutional right to remain silent but testified nevertheless. Subsequently, they were charged with perjury based upon their grand jury testimony. It was asserted that defendants believed that invoking their privilege would have led to suspension from the police department. The court held that "a statement given as a result of a coerced waiver of Fifth Amendment rights can [not] be the basis for a perjury prosecution" 166 N. W. 2d. at 669. However the court clearly misconstrued the Fifth Amendment protection afforded a defendant who utters a false statement, exculpatory on its face, before a grand jury. See discussion, *infra.* It is clear that the Fifth Amendment privilege pertains to past acts. Its inapplicability to perjury is equally clear. The court in *Allen* misconceived the function of the exclusionary rule, in disregarding the fact that defendants had been charged with perjury.

"lying is not one of them." *Ibid.* In *Kay* v. *United States,* 303 U. S. 1, 6 (1938), this Court noted that "when one undertakes to cheat the government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the government in which the effort to cheat or mislead is made are without constitutional sanction." And in *Dennis* v. *United States,* 384 U. S. 855, 867 (1966), this Court reiterated that basic principle, stating:

> "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, *he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction . . . Analogous are those cases in which prosecutions for perjury have been permitted despite the fact* that the trial at which the false testimony was elicited was upon an indictment stating no federal offense; (*United States* v. *Williams,* 341 U. S. 58, 65-69, 71 S. Ct. 595, 599-601, 95 L. Ed. 747); *that the testimony was before a grand jury alleged to have been tainted by governmental misconduct* (*United States* v. *Remington,* 208 F. 2d 567, 569 (C. A. 2d Cir. 1953), *cert.* denied, 347 U. S. 913, 74 S. Ct. 476, 98 L. Ed. (1969); or that the defendant testified without having been advised of his constitutional rights (*United States* v. *Winter,* 348 F. 2d 204, 208-210 (C. A. 2d Cir. 1965), *cert.* denied, 382 U. S. 955, 86 S. Ct. 429, 15 L. Ed. 2d 360, and cases cited herein). 384 U. S. at 866 . . . The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." (emphasis added) 384 U. S. at 867.

Cf. Acanfora v. *Montgomery City Board of Education,* —— U. S. ——, 42 *U.S.L.W.* 2439 (1974).

This well settled rule of law is deeply rooted in reason and applies with equal force in this case. Even assuming that respondent's will was overborne, the compulsion emanating from his conference with the Supreme Court was to testify truthfully, not falsely. Any other conclusion would reduce the witness' oath to a meaningless shibboleth. Moreover, assuming that respondent's waiver of his Fifth Amendment privilege was the product of his fear of removal from office or disbarment, that would not permit him to violate his oath and lie with impunity.

This Court has held that statements obtained during the course of disciplinary investigations under threat of dismissal from office cannot be used as evidence in a subsequent criminal prosecution. In *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), for example, this Court reversed the convictions of six New Jersey police officers who had testified before a grand jury after being advised of the then existing statute providing for job forfeiture upon refusal to testify. At trial, their grand jury testimony, which was highly inculpatory, was admitted against them as declarations against penal interest. In reversing, this Court concluded that dismissal from public employment under those circumstances exacted an unwarranted price for exercising the privilege. See also *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973); *Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Comm'r,* 392 U. S. 280 (1968); *Spevack* v. *Klein,* 385 U. S. 511 (1967).

Significantly, defendants in *Garrity* did not testify falsely before the grand jury. On the contrary, they testified truthfully, thereby incriminating themselves as to

past criminal misdeeds. Thus, this Court's holding in *Garrity* is in no way applicable to the facts here. Perhaps the most thorough analysis of the *Garrity* rationale as it affects the use of compelled but untruthful testimony can be found in *People* v. *Goldman,* 21 N. Y. 2d. 152, 287 N.Y.S. 2d 7, 234 N. E. 2d 194 (1967), appeal dismissed for want of substantial federal question, 392 U. S. 643 (1968), rehearing denied 393 U. S. 899 (1968). There, defendant, a police officer, was charged with perjury after he executed a limited waiver of immunity and testified before a grand jury. It was urged on appeal that said waiver was void because "it was extracted on pain of losing his job." 234 N. E. 2d at 195. The argument was also advanced, using *Garrity* as authority, that since the waiver was the product of coercion, the false grand jury testimony could not form the basis of a perjury indictment. Judge Breitel, writing for a unanimous court, initially reasoned that the scope of the Fifth Amendment protection does not immunize "one . . . from prosecution . . . for perjurious or contumacious testimony." *Id.* at 197. Then, applying the rationale of *Glickstein* v. *United States, supra,* the court analogized the situation to one in which a witness is granted immunity; although the testimony is unquestionably coerced, no insulation is afforded from prosecution, conviction or punishment for perjury. It thus concluded that Fifth Amendment protection does not extend to or license untruthful statements. The holding of *Goldman* is plain. Despite the "coerced" waiver of immunity and subsequent testimony, the witness "is not immune from penalties for crimes inherent in the giving of the testimony iteslf." *Id.* at 198. It is noteworthy, too, that this Court subsequently dismissed Goldman's appeal for lack of a substantial federal question.

Similarly, in *People* v. *Ricker,* 45 Ill. 2d 562, 262 N. E. 2d 456 (1970), defendant was convicted of perjury. There,

it was alleged that he had made contradictory statements before two grand juries. *Ricker* asserted that he had been threatened by his superiors with loss of his position as an attorney with the Metropolitan Sanitary District of Greater Chicago. As a public official, he could have been dismissed for refusing to waive his privilege against self-incrimination before the grand jury. The court recognized the mandate of *Garrity* that "[i]f he testified because he would otherwise have forfeited his public position, his testimony could not be used in a prosecution for a past crime." 262 N. E. 2d at 460. However, the court held:

> ". . . [W]hether the defendant was warned of his constitutional privilege, whether he properly signed his immunity waiver, or whether he could have been compelled to testify is beside the point. *He did testify, he testified falsely and he can be convicted of perjury.*" (emphasis added) 262 N. E. 2d at 461.

The Court in *Ricker* concluded that neither the Fifth Amendment nor *Garrity* was applicable since defendant had testified falsely before the grand jury. All conduct on the part of the Government, including the allegation of coercion, was disregarded. See also *People* v. *Genser,* 250 Cal. App. 2d. 351, 58 Cal. Rptr. 290 (1967).

Petitioners urge a similar treatment of the issue raised here. An individual who is compelled to appear and to testify before a grand jury is protected to the extent that his truthful testimony may not be used in a criminal proceeding against him. However, Helfant's perjurious misconduct before the grand jury must bar him, here, from asserting that alleged governmental impropriety "coerced" him to so testify. When respondent appeared before the grand jury he had not yet committed the crime for which

he is now indicted. His ". . . criminal liability concurred with the words he first uttered to the . . . Grand Jury." *United States* v. *Parker,* 244 F. 2d 943, 947 (7th Cir. 1957). Further, the four counts which charge false swearing were not "based upon evidence of past acts obtained from the mouth of the [respondent] in violation of Fifth Amendment rights. Instead, [they were] based on a crime whose very commission, rather than evidence of commission was the [respondent's] testimony." *United States* v. *Ponti,* 257 F. Supp. 925, 926 (E. D. Pa. 1966). When a witness chooses to testify untruthfully, he is simply not protected by the Fifth Amendment from a resulting prosecution. *United States* v. *Miller, supra.* See also *United States* v. *Daniels,* 461 F. 2d 1076, 1077 (5th Cir. 1972); *United States* v. *Manfredonia,* 414 F. 2d 760, 765, fn. 3 (2d Cir. 1969); *United States* v. *Remington,* 208 F. 2d 567, 569 (2d Cir. 1953), *cert.* denied 347 U. S. 913 (1953); *United States* v. *Parker,* 244 F. 2d 682, 690 (7th Cir. 1957), *cert.* denied 355 U. S. 836 (1959); *United States* v. *Winter,* 348 F. 2d 204, 208-209 (2d Cir. 1965), *cert. den.* 382 U. S. 955 (1965).[22] Thus, as the dissent properly points out, Helfant's testimony is admissible in evidence

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[22] As Wigmore wrote:

> "If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself for the perjured utterance is not 'evidence' or 'testimony' to a crime but is the very act of crime itself; the compulsion is not to testify falsely but to testify truly; and the privilege by hypothesis would have been violated only if the witness had truly given self-incriminating evidence, but if he falsely exonerates himself, he has confessed no fact 'against himself,' hence his privilege has not been infringed by the actual answer even though it might have been by some other answer." *VIII Wigmore, Evidence* §2282, p.512 (McNaughton Rev. ed. 1961).

even assuming that it was coerced (A30).[23] Although the allegedly coerced testimony may not be used to establish respondent's commission of the substantive offenses, the State may use it to prove that he swore falsely.

3. The effect of Coercion on the Substantive offenses.

What has been said thus far relating to the nature of respondent's claimed "constitutional" deprivation applies with equal force with respect to the hypothetical injury which would result from trial on the pending substantive charges. Assuming that respondent was coerced into testifying, that standing alone is insufficient justification to bar prosecution. In short, respondent's complaint nowhere alleges that Helfant gave testimony which is incriminatory. The State has stipulated that it deemed his testimony to be exculpatory, and therefore did not intend to use those statements, except perhaps on cross-examination of respondent if he should depart from them. And, there is no allegation that Helfant intended to depart from his grand jury testimony. The dissenting judges below accordingly deemed the "coercion" issue wholly "conjectural," and unworthy of federal interference with the State's criminal process. We think the issue non-existent in the absence of an allegation of incrimination or some other prejudice in the defense to the criminal charges.

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[23] This argument was vigorously advanced by petitioners below. Nevertheless, the majority opinion is devoid of any reference to petitioners' argument. Following the rendition of the Court's judgment issued in lieu of a formal mandate, petitioners moved for a recall of the Court's order and for clarification. Specifically, petitioners asked the Court to clarify whether a finding of coercion would preclude prosecution of the false swearing charges. The Court denied petitioners' application.

It is beyond cavil that reception before a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve to vitiate the resulting indictment. See, *e.g.*, *United States* v. *Calandra*, —— U. S. ——, 42 *U.S.L.W.* 4104 (1974); *United States* v. *Blue*, 384 U. S. 251 (1966); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1966); *Holt* v. *United States*, 218 U. S. 24 (1910).[24] When a witness has been wrong-

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[24] *Gelbard* v. *United States*, 408 U.S. 41 (1972) is not to the contrary. In *Gelbard*, this Court was presented with the narrow question of whether a witness before a grand jury who was cited for civil contempt for refusal to answer questions she believed were based on illegal wiretap evidence, had standing under 18 U. S. C. §2515 to suppress the evidence. The decision according defendant standing was based exclusively on federal statutory grounds. Thus, the sole relevance of *Gelbard* to the instant matter is its reaffimance of the long standing rule that:

> "A defendant is not entitled to have his indictment dismissed before trial simply because the government acquired incriminating evidence in violation of the law, even if the tainted evidence was presented to the jury." *Id.* at 60.

One line of cases has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See *e.g. Goldberg* v. *United States*, 472 F. 2d. 513, 516 (2d Cir. 1973); *Jones* v. *United States*, 342 F. 2d. 863 (D. C. Cir. 1964); *United States* v. *Tane*, 329 F. 2d. 848 (2d Cir. 1964); *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953), appeal dismissed *sub nom*; *United States* v. *Roth*, 208 F. 2d. 467 (2 Cir. 1953). For example, the court in *Goldberg* v. *United States, supra*, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to

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incriminating matters. The court applied the rationale of *Bruton* v. *United States*, 391 U. S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. *Goldberg* v. *United States*, *supra* at 516.

It is submitted that this Court's decision in *United States* v. *Calandra supra*, laid this debate to rest. But assuming that *Calandra* is not dispositive, the indictment in this case would not be subject to attack. It is settled that a mere appearance before a grand jury, albeit compelled, will not vitiate an indictment even if the witness asserts his privilege against self-incrimination. See *United States* v. *Wolfson*, 405 F. 2d. 779, 784-785 (2d Cir. 1968), *cert* den. 394 U. S. 946 (1969); *United States* v. *Winter*, *supra*, *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D.N.J. 1970); *United States* v. *Desapio*, 299 F. Supp. 436, 440 (S. D. N. Y. 1969). Clearly, then,a witness must incriminate himself (absent a valid waiver) before the same grand jury which indicts him to give rise to the claim that the indictment so obtained is based on coerced testimony. Indeed, if the utterances are not incriminatory, Fifth Amendment protection does not attach.

In his testimony before the grand jury, respondent vigorously denied all the facts material to the allegations against him. His testimony was entirely exculpatory and thus could not rationally have provided the basis for the indictment; nor indeed could it have served to corroborate the other, independent evidence already before the grand jury. So too, no "*Bruton*-type" problem could arise in this case. Compare *Goldberg* v. *United States*, *supra*. It is undoubtedly the other evidence—specifically the earlier testimony of two unindicted co-conspirators—upon which the Grand Jury relied in returning the first three counts of the indictment. This evidence, clearly competent and legally admissible, amply insulates the indictment against constitutional challenge. See *Costello* v. *United States*, *supra*. Respondent has thus suffered no prejudice by virtue of his "coerced testimony" before the grand jury. Therefore, the indictment must stand even if the rationale of the *Jones* and *Goldberg* line of cases is applied.

fully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coerced testimony and its derivative use. *Kastigar* v. *United States*, 406 U. S. 441 (1972); *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U. S. 472 (1972); *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). It is equally clear that the "use" which is prohibited is the introduction of the "tainted" evidence at trial and not before a grand jury.[25] *United States* v. *Calandra*, *supra*. See also *United States* v. *Addonizio*, 313 F. Supp. 486, 494 (D. N. J. 1970). Thus, the majority was correct when it determined that there was no basis in law for an outright injunction against prosecution, for an injunction under these circumstances would have been tantamount to a dismissal of the indictment.

However, the Court of Appeals improperly concluded that a finding of coercion by the district court would support a declaratory judgment to the effect that the allegedly tainted evidence may not be introduced at respondent's trial. As noted in the dissenting opinion, "the edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the State will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing" (A29). This is an eventuality which has not yet arisen and indeed will in all probability never come to pass.

[25] New Jersey law is in accord. An indictment will not be vitiated merely because incompetent evidence was presented to the grand jury. See, *e.g. State* v. *Ferrante*, 111 N. J. Super. 99, 268 A. 2d 301 (App. Div. 1970); *State* v. *Garrison*, 130 N. J. L. 350, 33 A. 2d. 113 (Sup. Ct. 1943); *State* v. *Donovan*, 129 N. J. L. 478, 30 A. 2d. 421 (Sup. Ct. 1943); *State* v. *Ellenstein*, 121 N. J. L. 304, 2 A. 2d. 454 (Sup. Ct. 1938).

Adjudication of this issue by the federal courts is plainly premature and in advance of constitutional necessity. There is no indication that the Attorney General intends to utilize respondent's testimony in any way. As previously noted, at oral argument before the Court of Appeals, counsel for the State represented that Helfant's grand jury testimony will be used, if at all, only to impeach any inconsistent statement respondent might utter should he take the witness stand.[26] It becomes apparent that the constitutional injury sought to be averted by the majority is thus conjectural, depending for its very existence upon a hypothetical series of events that probably will never occur.

A deeply embedded principle of our jurisprudence precludes the resolution of abstract disputes in advance of

[26] At oral argument, counsel for New Jersey stated "[a]t this time there is no present intention of using that testimony. But were the [respondent] to take the stand, were his testimony to deviate in strong terms, that, testimony then, of course, under *Harris* v. *New York,* [401 U. S. 222 (1970)] might well be" [admissible to impeach his credibility.] That concession was not prompted by an excess of altruism on the part of the Attorney General. It would surely be poor trial strategy for the prosecution to seek to introduce respondent's exculpatory statements as substantive evidence. Indeed, Helfant's grand jury testimony would not qualify as a declaration against penal interest. Therefore, it would not be admissible under Rule 63 (10) of the *New Jersey Rules of Evidence.* So too, there is no authority which would support the admission of "compelled" statements to contradict a witness' trial testimony. *Cf. Harris* v. *New York, supra.* Nor would respondent's assertion of the defense of duress require the State courts to resolve the coercion issue. In New Jersey, the defense of duress would not be recognized under the facts here. *State* v. *Falco, supra; State* v. *Palmieri,* 93 N. J. L. 195, 199-200, 107 A. 407 (E. & A. 1919); 67 *Harv. L. Rev.* 1071-72 (1954).

constitutional necessity, hence the constitutional requirement of a case or controversy. *United States Constitution,* Article III, Section 2. *Flast* v. *Cohen,* 392 U. S. 83, 95-98 (1966); *United States* v. *Fruehauf,* 365 U. S. 146, 157 (1961); *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1944); *Muskrat* v. *United States,* 219 U. S. 346, 348 (1911); C. Wright, *Federal Courts* 34 (2d ed. 1963). Embodied in the phrase "case or controversy" is a limitation on the business of the federal courts which confines their authority to deciding "questions presented in an adversary context and in a form capable of resolution through the judicial process." *Flast* v. *Cohen, supra* at 95. Whether grounded in constitutional principle, see, *e.g. Commonwealth of Massachusetts* v. *Mellon,* 262 U. S. 447 (1923); *Fairchild* v. *Hughes,* 258 U. S. 126 (1922), or viewed as a mere policy limitation, see *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288 (1936), federal courts have long avoided passing prematurely on constitutional questions. Judicial authority may be invoked only when the interests of litigants require protection against actual and immediate interference. A hypothetical threat is not enough. Thus, the related doctrines of "standing," "ripeness," and "mootness" which have evolved over the years are incidents of the primary concept that federal judicial power is to be exercised only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe* v. *Ullman,* 367 U. S. 497, 504 (1961). See also *O'Shea* v. *Littleton,* —— U. S. ——, 94 S. Ct. 669, 674 (1974); *Allee et al.* v. *Medrano, supra; Boyle* v. *Landry,* 401 U. S. 77 (1971). The same rule obtains whether the litigation concerns a challenge to the validity of a statute or the claimed denial of a constitutional right. *Cf. Cleary* v. *Bolger,* 371 U. S. 392, 402 (1963) (Goldberg, J., concurring).

These principles take on added significance when the federal courts are asked to interfere with a pending state prosecution. *Younger* v. *Harris, supra*. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial. As previously noted, a crucial aspect of *Younger's* limitation upon incursions into state proceedings is the necessity of a showing of "great and immediate" constitutional injury. *Id.* at 46. Absent this principle, "[e]very question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of state courts by the federal forum . . . to determine the issue." *Stefanelli* v. *Minard, supra* at 117, 123-24 (1951). Further, this danger has become far more acute as our Constitution has been interpreted to embrace rights not previously thought to fall within its protection.

The majority's disregard of the "great and immediate" harm limitation thus emerges in sharp focus. More than a year and-a-half has passed since the grand jury returned the indictment charging respondent with crimes that allegedly occurred in 1968. During this time, New Jersey has been thwarted from proceeding with the prosecution. Significantly, one critical witness has died and other witness' memories have presumably dimmed. Respondent, who of course is presumed innocent until proven guilty, is seen in his old haunts undeterred and unaffected by the grand jury's finding of probable cause. To the public, this delay must appear unseemly. Surely, respect for the law is thereby diminished.

Nor is there any likelihood that this saga will come to an end in the near future. The court below has ordered a federal trial in the middle of state criminal proceedings in which respondent's challenge to the admissibility of evi-

dence is to be resolved. This lengthy disruption seems unsupportable since the prosecution has represented that the evidence sought to be suppressed will never be used. In any event, it would be erroneous to conclude that the district court's judgment will finally resolve the issue. That prospect appears remote since there is a strong possibility of other appeals from the fact-finding proceedings which are to be conducted pursuant to the court's mandate.

It bears repeating that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings, a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment privilege. See 28 *U.S.C.* §2254 (d).[27] Thus respondent is not without a federal forum for resolution of his constitutional claim.

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[27] 28 U. S. C. §2254(d) provides in part that in federal district courts, upon an application for habeas, prior state-court findings of fact "shall be presumed to be correct" unless:

> "(2). . .the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or
>
> "(6). . .the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> "(7). . .the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

Rather, at issue is the sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, to be weighed is the right of the state courts to try state cases free of federal interference against the interest of the citizen to immediate disposition of his federal constitutional claims by a federal court. The tension between these competing interests can best be alleviated by declining to permit federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy" (A37). Substantial interests of federalism are thus sacrificed not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the decision offends basic considerations of comity and tears at the very roots of "Our federalism." It is respectfully submitted that these significant issues require this Court's review.[28]

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[28] Petitioners are fully cognizant of the "interlocutory" status of this matter. In the usual case this Court will not grant certiorari to review a non-final judgment. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U. S. 327 (1968) and *Youngstown Sheet & Tube Co.* v. *Sayer*, 343 U. S. 577 (1952). But where there is a significant and obvious issue of law that is fundamental to the further conduct of the case, and that would otherwise qualify as a basis for certiorari, the order under attack may be reviewed despite its interlocutory status.

(Footnote continued on following page)

(Footnote continued from preceding page)

See *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685, fn. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731, 734, fn. 2 (1947) and *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945). This doctrine has been held especially applicable to cases where, as here, the appealable issues are separable from and collateral to rights asserted in the action, and which are too important and independent of the cause itself to require that certiorari be deferred until the entire case is adjudicated. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949). See also *Stack* v. *Boyle*, 342 U. S. 1 (1951); *Roberts* v. *United States District Court*, 339 U. S. 844 (1949); *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684 (1949).

Immediate review of the issues raised by this petition is particularly appropriate. As previously noted, the Court of Appeals' decision is, in and of itself, an unjustifiable incursion into proper and traditional state functions. If the district court on remand finds in favor of petitioners, the acute injury resulting from the Court of Appeals' decision will not be abated. The dangerous precedent will stand. Thus this case falls within a "limited class. . .where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Nixon*, —— U. S. ——, ——, 42 U. S. L. W. 5237, 5240 (1974).

CONCLUSION

For the foregoing reasons, petitioners pray that their petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Petitioners.

DAVID S. BAIME,
Chief, Appellate Section,

ALFRED J. LUCIANI,
Deputy Attorneys General,
Division of Criminal Justice,
Of Counsel and on the Petition.

APPENDIX

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate, dated July 23, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

(D. C. Civil Action No. 607-73)

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

Upon consideration of appellees' motion to Recall Judgment in Lieu of Formal mandate, and for certain other

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate, dated July 23, 1974

relief, and brief in support thereof, and appellant's brief in opposition thereto, all in the above entitled case,

By direction of the Court, it is ORDERED that this Court's certified judgment, issued in lieu of formal mandate on July 8, 1974, be, and hereby is recalled; and

It is Further Ordered that the issuance of the certified judgment in lieu of formal mandate be, and hereby is stayed until August 7, 1974.

For the Court,

THOMAS F. QUINN
Clerk

Dated: July 23, 1974

Certified Judgment in Lieu of Mandate, dated July 8, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN, PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and the STATE OF NEW JERSEY

(D. C. Civil Action No. 607-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was reargued by counsel.

Certified Judgment in Lieu of Mandate, dated July 8, 1974

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which dismissed the complaint be, and the same is hereby reversed. The order entered May 9, 1973, denying the motion for a preliminary injunction is vacated and the cause is remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court, unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court.

ATTEST:

THOMAS F. QUINN
Clerk

July 8, 1974

Certified as a true copy and issued in lieu
of a formal mandate on July 8, 1974

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Copy

Opinion of the United States Court of Appeals for the Third Circuit, *En Banc*, dated July 8, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,
Appellant,

v.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDEN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR. and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.
(Civil Action No. 607-73)

Argued September 7, 1973
Submitted Under Third Circuit Rule 12(6)
November 19, 1973
Before: STALEY, ADAMS and GIBBONS, *Circuit Judges.*

Reargued April 10, 1974
Before: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed July 8, 1974)

Perskie & Callinan, Esqs.
By Marvin D. Perskie, Esq.
Patrick T. McGahn, Jr., Esq.
Wildwood, New Jersey
COUNSEL FOR APPELLANT

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Attorney General of New Jersey
Trenton, New Jersey
David S. Baime, Deputy Attorney General
Alfred J. Luciani, Deputy Attorney General
Edward C. Laird, Deputy Attorney General
COUNSEL FOR APPELLEES

ALDISERT, *Circuit Judge.*

Presenting a delicate question of federal-state comity, this appeal requires us to decide whether federal fact-finding should be utilized to determine whether a New Jersey municipal court judge's testimony before a state grand jury was the product of a free and unconstrained will. Contending that his Fifth Amendment rights as guaranteed by the Fourteenth Amendment will not be vindicated by the New Jersey state court system, appellant argues that the federal courts should provide relief because highly unusual circumstances dictate an exception to the familiar restrictive rule of *Younger v. Harris*, 401 U.S. 37 (1971).

I.

This is an appeal from an order of the district court which (1) denied plaintiff's request for a preliminary in-

junction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state,[1] and (2) granted the defendants' motion, under Rule 12(b)(6) F.R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, and made limited findings of fact. The appeal was argued before a panel of this court on September 7, 1973. Deeming the issues raised to be substantial, the trial on the challenged indictment being scheduled to commence on September 10, 1973, and the Attorney General of New Jersey declining to postpone it until the panel could decide the case, the panel entered an order enjoining the prosecution until such time as the appeal could be decided. Panel opinions were filed on September 10 reversing and remanding for further proceedings. Thereafter, representing that the State was willing to delay plaintiff's trial until disposition of the application for rehearing, the state attorney general petitioned for rehearing. Based on that representation, we recalled our mandate on September 21, 1973. Rehearing was granted before the panel; supplemental briefing was ordered on certain issues suggested by the appeal which had not been previously briefed or argued; and the panel subsequently granted some relief, one judge dissenting. Because of important federal-state comity questions, the full court subsequently agreed to hear the case in banc.

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1. The plaintiff was arraigned on the Indictment SGJ 10-72-10 on February 2, 1973. Trial was originally set for May 14, 1973.

The state's brief in support of its motion to dismiss in the district court discloses:

> Plaintiff herein, Edwin Helfant, stands charged in a nine count indictment handed up by the State Grand Jury charging him with conspiring with his codefendant, Samuel Moore, to obstruct justice, with obstructing justice in connection with his codefendant, Samuel Moore, with aiding and abetting compounding a crime and with four counts of false swearing. * * * All of the substantive offenses stem from the wrongful dismissal of an atrocious assault and battery complaint which resulted from a fight in a tavern in Egg Harbor City on March 17, 1968. The false swearing counts in the indictment stem from the appearance of the defendant before the grand jury on November 8, 1972.

II.

Plaintiff-appellant, Helfant, a member of the New Jersey bar and a former municipal court judge of that state, alleged in a verified complaint that he had been advised that he was the target of a state grand jury investigation into an alleged withdrawal of a criminal charge of atrocious assault and battery. Armed with this information, and asserting a Fifth Amendment privilege, Helfant refused to testify when he first appeared before the state grand jury on October 18, 1972. He was subsequently subpoenaed to appear again before the grand jury on November 8, 1972, which was then sitting at the Trenton State House Annex on the same floor as the chambers of New Jersey State Supreme Court justices. Helfant was also directed to appear before the justices of the Supreme Court in their private chambers 10 minutes before his scheduled re-appearance before the grand jury.

The complaint averred that upon his appearance in the Supreme Court chambers, several justices asked questions about the subject matter of the grand jury investigation, including matters not then made public and also including inquiries concerning certain witnesses who had testified against Helfant before the grand jury.[2]

2. Helfant's complaint avers:

He was questioned by the Chief Justice [Weintraub] and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State

His complaint averred that "[a]fter . . . [he] left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. * * * As a result of these questions, [by justices of the Supreme Court,] the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well."

Helfant also averred that Deputy Attorney General Hayden, conducting the grand jury investigation, entered the Supreme Court chambers after plaintiff left and that Hayden had also preceded the plaintiff into the chambers.

Finally, his complaint alleges:

14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Ex-

2. (Cont'd.)

Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

ecutive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him.

At the injunction hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and testified himself. Relevant testimony by Helfant is set forth in the margin.[3]

3. Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton?

A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

* * *

Q. Were they sitting in their robes?

A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in?

A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

* * *

Q. And what was your state of mind and your feelings as you entered those Chambers?

A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can?

A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation?

A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right

By oral opinion the district court denied preliminary injunctive relief on the ground that *Younger v. Harris, supra,* precluded federal intervention. It also dismissed the complaint for failure to state a claim for which relief can be granted. In the posture in which this case is before us, the district court has ruled only on the legal sufficiency of the complaint, pursuant to the Rule 12(b)(6) motion. "Findings of fact . . . are unnecessary on decisions of motions under . . . [Rule] 12. . . ." Rule 52(a), F.R. Civ. P. Although an evidentiary hearing on the injunction request was conducted, and the court made limited findings thereon, it did not find facts with respect to the merits of Helfant's § 1983 claim. Thus, there have been no fact-findings on the crucial issue of whether Helfant's

3. (Cont'd.)

to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond?

A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was suppose to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice?

A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court?

A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out——

A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q. And what did you tell him?

A. I said, Mr. Chief Justice, I am going to testify.

N.T. 22-26.

testimony before the grand jury was the product of his free and unconstrained will. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

"Since *Chambers v. Florida*, 309 U.S. 227, . . . [the Supreme] Court has recognized that coercion can be mental as well as physical. . . ." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts v. Indiana*, 338 U.S. 49, 53 (1949). The decision must be freely as well as rationally made. *Blackburn v. Alabama, supra*, 361 U.S. at 208.

III.

Because we are reviewing a Rule 12(b)(6) dismissal order, we must take as true Helfant's allegations that his testimony before the grand jury was not the product of a free and unconstrained will and that he is about to be tried on an indictment containing charges emanating from that coerced testimony.

Younger v. Harris, supra, 401 U.S. at 53, holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *See, Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971); *Conover v. Montemuro*, 477 F.2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the predicate of *Younger v. Harris* is an assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Thus, invocation of the "extraordinary circumstances" exception must bring into play the suggestion of an inability of the state forum to afford an adequate remedy at law.

By his complaint, plaintiff alleges that he was coerced by members of the State Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that, as a result, he was indicted because of his allegedly coerced testimony. Helfant also avers that a New Jersey trial court has declined his motions to dismiss indictments emanating therefrom, on the grounds that they were based on his coerced testimony. *See, e.g., United States v. Calandra*, — U.S. — (42 U.S.L.W. 4104, January 8, 1974).

Under the unusual circumstances of this case, can it be said that the appellant may not vindicate his constitutional rights by a defense in "a single criminal prosecution"? Otherwise stated, do the administrative powers of the New Jersey Supreme Court, in the factual complex giving rise to appellant's constitutional claims, threaten his opportunity for the vindication of his federal rights in the New Jersey state court system? Thus our analysis requires an examination of the "power parameters" of the New Jersey Supreme Court.

IV.

The New Jersey Constitution provides: "The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State." Article VI, § 7, Par. 1. "The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears. Assignments to the Appellate Division shall be for terms fixed by Rules of the Supreme Court." Article VI, § 7, Par. 2.

"Thus this court is charged with responsibility for the overall performance of the judicial branch. Respon-

sibility for a result implies power reasonably necessary to achieve it. More specifically, the power to make rules imports the power to enforce them." *In re Mattera,* 34 N.J. 259, 168 A.2d 38, 45 (1961).

"The constitutional administrative power is absolute and unqualified, and our Supreme Court has characterized it as the 'plenary responsibility for the administration of all courts in the State.' State v. De Stasio, 49 N.J. 247, 253, 229 A.2d 636, 639, cert. den. 389 U.S. 830, 88 S.Ct. 96, 19 L.Ed.2d 89 (1967). See in re Mattera, 34 N.J. 259, 271-272, 168 A.2d 38 (1961). See also N.J. Const., Art. XI, § IV, par. 5; *cf.* N.J. Const., Art. VI, § VII, par. 1. Additionally, compare Kagan v. Caroselli, 30 N.J. 371, 379, 153 A.2d 17, 21 (1959), wherein the court observed that '[t]he Constitution places the administrative control of the municipal court in the Supreme Court and the Chief Justice. Art. VI, § 2, par. 3; Art. VI, § 7, par. 1. There is no room for divided authority.'

"The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. Conceptually, such authority encompasses all facets of the internal management of our courts. *Cf. Mattera, supra,* 34 N.J. at 272, 168 A.2d 38. This was made clear by the Committee on the Judiciary which considered it a fundamental requirement that the courts be vested with 'exclusive authority over administration.' 2 Proceedings of the Constitutional Convention of 1947, at 1180, 1183." *Lichter v. County of Monmouth,* 114 N.J. Super., 276 A.2d 382, 385-386 (1971).

Thus, it becomes readily apparent that the Supreme Court of New Jersey is more than an appellate court. Its "constitutional administrative power is absolute and unqualified." The Chief Justice "may from time to time transfer Judges from one assignment to another." The Supreme Court may assign judges to the Appellate Division for terms fixed by its own rules. The Supreme Court is vested with formidable supervisory and administrative

power extending not only to the trial court level but to the Appellate Division as well.

The posture of this case, requiring that we assume that the allegations charging coercion by the Supreme Court are true, the next question appears to be whether the appellant may vindicate his constitutional rights in this case in a state court system which functions under the "absolute and unqualified" administrative power of its highest court.

V.

Distilled to its essence, appellant's argument is that the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire state court system in processing his constitutional claim. But the schema of judicial review of federal constitutional questions presented in the state cases is not confined to the state court system. If convicted, and if persuaded that principles of federal constitutional law were not properly applied in the state system, Helfant will have the opportunity of applying for certiorari to the United States Supreme Court, 28 U.S.C. § 1257(3), and if given a custodial sentence, will have the additional right to apply to a federal forum for federal habeas corpus relief, 28 U.S.C. § 2254.

What complicates this particular case, however, is that the resolution of Helfant's specific contention will not be confined to interpreting, refining, or defining principles of constitutional law. Critical to the eventual constitutional interpretations is the threshold determination of whether Helfant's testimony before the grand jury was the product of a free and unconstrained will. This is not a question of law. It is a question of fact—narrative or historical facts as to what occurred and operative or constitutional facts as to the voluntariness of his actions. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. And some fact-finder must decide these.

We have not been directed to, nor has our research disclosed, any procedure by which this factual determination may be made by a jury. In New Jersey criminal law procedures, as is the case in federal practice, ultimate facts found by criminal court juries are merely verdicts of guilty or not guilty. The factual determination of the "free and unconstrained will" question within the state system will be made by a New Jersey state judge, a state judge subject to the "absolute and unqualified" administrative power of the Supreme Court, whose findings are presumably reviewable by an Appellate Division, assignment to which shall be by terms fixed by the rules of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself.[4] Thus, the New Jersey state court system would play an important role in both the fact-finding process and the review thereof, although upon acceptance of certiorari, "it is . . . [the U.S. Supreme Court's] duty . . . to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis v. North Carolina*, 384 U.S. 737, 741-742 (1966).

A litigant has come into a federal court asking for vindication of a federal constitutional right which is critically dependent upon a finding arising out of circumstances in which six of seven members of the New Jersey Supreme Court as then constituted are alleged to be directly

4. The New Jersey Supreme Court has set forth in detail the scope of appellate review of facts found by a trial judge: "There can be no doubt of the *power* of the appellate tribunals of this State . . . to review the fact determinations of a trial court in all cases heard without a jury and to make new or amended findings. * * * The aim of . . . review . . . is . . . to determine whether the findings could reasonably have been reached on sufficient credible evidence present in the record. * * * But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *State v. Johnson*, 42 N.J. 146, 199 A.2d 809, 816-818 (1964). *See also, State v. Yough*, 49 N.J. 587, 231 A.2d 598, 602 (1967); *State v. Daly*, 126 N.J. Super. 313, 314 A.2d 371, 373 (1973). The Supreme Court, in reviewing the decision of the Appellate Division, may itself deem it appropriate to conduct a *de novo* review. *State v. Johnson, supra*, 199 A.2d at 818.

involved. If denied federal relief, appellant will be restricted to a judicial procedure in which the resolution or modification of factual determinations would be committed to a court system under the administrative supervision of the participants in the factual complex. This presents an extremely awkward position.

VI.

To determine whether there should be an exercise of even limited federal judicial power under these circumstances requires a brief review of those fundamental principles which govern federal-state relations. Initially, the federal courts have subject matter jurisdiction of an action commenced by a person "[t]o redress the deprivation, under color of any State law . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ." 28 U.S.C. § 1343(3). Congress has afforded Helfant a remedy to bring "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. And the Supreme Court has held that this may be by means of injunction, *Mitchum v. Foster*, 407 U.S. 225 (1972), or by declaratory judgment, *Steffel v. Thompson*, — U.S. — (42 U.S.L.W. 4357, March 19, 1974).

In the sensitive and delicate area of federal-state relations, where the power of government is divided between a federation and its member states, there is no constitutional barrier, and since *Mitchum v. Foster, supra*, no absolute Congressional barrier, to federal court intervention in state criminal proceedings.

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judicial Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well-defined

statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved." *Douglas v. City of Jeannette,* 319 U.S. 157, 162-163 (1943).

In *Stefanelli v. Minard,* 342 U.S. 117, 120 (1951), Mr. Justice Frankfurter emphasized that this policy of federal court restraint is based on "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. . . ." "Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute [Civil Rights Act] 'should be construed so as to preserve the proper balance between the States and the federal government in law enforcement.' *Screws v. United States,* 325 U.S. 91, 108." *Ibid.,* at 121.[5]

Mr. Justice Black would emphasize in *Younger v. Harris, supra,* 401 U.S. at 44: "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means

5. "Mr. Justice Holmes dealt with this problem in a situation especially appealing: 'The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and intervene.' Memorandum of Mr. Justice Holmes in V. Sacco/Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516." *Ibid.,* 342 U.S. at 124-125.

centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Thus, federal judicial policy against intervention in state criminal proceedings is bottomed on an unwillingness for federal *disturbance* of "the notion of 'comity,' that is, a proper respect for state functions," state institutions, and especially, state court systems. We now proceed to determine whether some minimum exercise of federal authority in these proceedings will *disturb* or whether it will *implement* this proper respect for state functions.

VII.

So posited, we reject appellant's basic contention that he is entitled to a federal order permanently enjoining the prosecution of the indictments. "[C]ourts of equity in the exercise of their discretionary powers should . . . [refuse] . . . to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds." *Douglas v. City of Jeannette, supra,* 319 U.S. at 163. In the context of permanently enjoining the state prosecution, we do not find bad faith or harassment, *Dombrowski v. Pfister,* 380 U.S. 479 (1965), nor do we find this to be one of those "exceptional cases," *Douglas v. City of Jeannette, supra,* or "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of

the usual prerequisites of bad faith and harassment." *Younger v. Harris, supra,* 401 U.S. at 53. We have not been persuaded that Helfant will be precluded from asserting constitutional rights in his defense of a single criminal proceeding. *Younger v. Harris, supra.*

We find no reason to depart from the formidable general policy of "leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this [Supreme] Court of any federal questions involved." *Douglas v. City of Jeannette, supra,* 319 U.S. at 163.

The considerations which militate against granting a permanent injunction against the conduct of the state trials do not surface, however, when considering the limited relief of a federal declaratory judgment as to whether Helfant's testimony before the grand jury was the product of his free and unconstrained will. If limited federal intervention is permitted, the state court system will ultimately be free to conduct the trials and appeals, if any, as an independent judiciary, free from any interference.

Since Helfant has a statutory right to have a claim for declaratory relief adjudicated in the federal courts, and will be denied the opportunity to be heard only if there is a threat to the delicate structure of comity between the federal and state systems, our next task is to examine the effect of limited federal fact-finding under these highly sensitive circumstances.

Judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove. Lord Herschell's remark to Sir George Jessel comes to mind: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."[6]

In the context of this highly unusual factual complex, it is critical that traditional respect for an outstanding

6. R. Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605, 606 (1908).

state court system be nurtured, preserved, and supported; that the state court process this indictment without the slightest suggestion that it is unable to perform its function without total objectivity, or that there be even the appearance of any infirmities. Federal court action which seeks to guarantee such an appearance and which bolsters and enhances the reputation of a state court system does not denigrate comity. Indeed, it supplies a positive affirmation of the high respect the court system of one sovereign extends to that of another. To order federal fact-finding within an extremely narrow compass, under these circumstances, comports with, rather than offends, the mutual relationship poignantly described by Justice Black as "Our Federalism."

Such limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the "brooding omnipresence" of the New Jersey Supreme Court. At the same time if the case proceeds to a state appellate level, judges of the reviewing courts will be able to adjudicate any federal constitutional questions with maximum freedom. Moreover, if the case should proceed to the New Jersey Supreme Court, that court will not be placed in an untenable situation of being a court of review as to findings of facts in which they are allegedly participants.

We are persuaded that there will be total "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris, supra,* 401 U.S. at 44. Thus, by a federal resolution of this limited issue, the factual predicate of the appellant's federal claim will be resolved in the federal forum and, at the same time, the

state will be completely free to proceed with the state prosecution and therein to vindicate appellant's constitutional rights.

Such limited declaratory relief does not have the force of an injunction, *Younger v. Harris,* or a declaratory judgment couched in such terms as would have "virtually the same practical impact as a formal injunction would." *Samuels v. Mackell,* 401 U.S. 66, 72 (1971). The use of the declaratory judgment here fits in precisely with the exception articulated by Mr. Justice Black in *Samuels v. Mackell,* 401 U.S. at 73: "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief."

We are quick to recognize that it may be contended that even such limited federal intervention in a state criminal proceeding would set an unwholesome precedent. Because of the high incidence of judicial fact-finding in pretrial hearings ancillary to state prosecutions, it can be envisioned that wholesale resort to this technique would be attempted. We are persuaded that any precedential value to our holding is miniscule. The factors which prompt our decision also limit its precedential value. First, perforce, the operative facts are limited to the State of New Jersey, where its constitution vests in the Chief Justice and the state's highest court the total and complete administrative control over judges of the trial level and appellate division. Second, this case alleged involvement by the Supreme Court with a municipal court judge, who allegedly was the target of state grand jury proceedings and who was summoned to appear before the Supreme Court minutes prior to a scheduled grand jury appearance. Third, it is alleged that prior to such appearance before

the state's highest court, Helfant had resolved to invoke the Fifth Amendment before the grand jury and that questioning by the Supreme Court appearance so unnerved him that he was unable to exercise a totally free will. Absent presence of these factors we see no future case receiving much precedential nourishment from the decision we reach today.[7]

Accordingly, the order dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be vacated and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court,[8] unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court. The mandate of this court shall issue forthwith.

ADAMS, *Circuit Judge,* dissenting

The majority, while conceding that this case presents "a delicate question of federal-state comity," resolves that

7. There was some suggestion that this court should construe the New Jersey public employee immunity statute, N.J.S.A. 2A: 81-17.2a2 in the context of Helfant's grand jury appearance. The litigants agree that this statute is not applicable since Helfant's presence before the grand jury was not associated with his role as a municipal court judge, but as a private attorney.

8. "A court of the United States may . . . grant an injunction to stay proceedings in a State court . . . where necessary in aid of its jurisdiction . . . ." 28 U.S.C. § 2283.

question by sanctioning federal interference in an ongoing state criminal proceeding. Warrant for this interference is purportedly found in the "extraordinary circumstances" exception to the anti-injunctive strictures of Younger v. Harris.[1] I conclude that this case, unusual as its facts may be, provides no occasion for casting aside the interwoven precepts of federalism and equitable jurisdiction that combine to make up the *Younger* doctrine of non-intrusion. Accordingly, I dissent.

The majority's exposition of the rule of *Younger* is fair: a federal court may not interfere in an ongoing state criminal proceeding [2] absent a showing of prosecutorial bad faith or harassment, or other "extraordinary circumstances." It is conceded that neither bad faith nor harassment are present in Helfant's prosecution.[3] Rather, the majority holds that the alleged involvement of the New Jersey Supreme Court in Helfant's prosecution embodies an "extraordinary" situation.

What the majority appears to overlook is that *Younger*, while setting out a nucleus of rules, did more. It expressed a spirit. Though some of the historical antecedents of the *Younger* decision undoubtedly extend further,[4] the first formal expression of the *Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued "to stay proceedings in any court of a

1. The term "anti-injunctive" is, of course, shorthand for the notion that *any* federal interference in ongoing state criminal proceedings, be it by injunction, declaratory judgment, or otherwise, is to be disfavored. *See* Samuels v. Mackell, 402 U.S. 66 (1971).

2. *Compare* Steffel v. Thompson, 14 Cr. L. Rep. 3123 (U.S., Mar. 19, 1974).

3. "Bad faith" and "harassment" signify, generally, that a prosecution is being brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. *See Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

4. For example, the conflict between law and equity, particularly as embodied in the practice of equity of enjoining proceedings at law, extends back at least into the seventeenth century. *See* O. Fiss, Injunctions 12 (1972). Justice Frankfurter, speaking more particularly, stated "[t]he maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

state."[5] Two apparent motives behind the statutory inhibition of the 1793 Act were to prevent encroachments by federal courts upon the then well-established state-court domain, and to codify the prevailing prejudices against extensions of equity jurisdiction and power.[6] One hundred and fifty years later the theme was repeated in Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.[7] There the anti-injunction statute was viewed as necessary, in part, to "prevent needless friction between state and federal courts."[8] And only this term the Supreme Court reiterated its sensitivity "to principles of equity, comity, and federalism."[9]

Of course, the Supreme Court has recently acknowledged that section 1983, under which Helfant's suit has been brought, is a specific exception to the absolute interdiction of the anti-injunction statute.[10] Nonetheless, section 2283 expresses a "long standing public policy"[11] against federal interference in state proceedings. The emanations from that policy must thus be heeded even in a 1983 suit.[11a] Accordingly, the same considerations that underlay the 1793 Act and its successors—a respect for state sovereignty and "basic doctrine[s] of equity" which "restrain . . . equity jurisdiction within narrow limits"[12]—have been imported into our civil rights jurisprudence.

5. 1 Stat. 335, the forebear of 28 U.S.C. § 2283. *See* Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. Chi. L. Rev. 471, 480 (1965). The statutory ban is today subject to several clearly delineated exceptions. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

6. *See* C. Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347 (1930); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 131 (1941).

7. 309 U.S. 4 (1940).

8. *Id.* at 19.

9. Steffel v. Thompson, *supra*.

10. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

11. Younger v. Harris, 401 U.S. 37, 43, 46 (1971); Mitchum v. Foster, *supra*, 407 U.S. at 230.

11a. *See* O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Mitchum v. Foster, *supra*, 407 U.S. at 243.

12. Younger v. Harris, *supra*, 401 U.S. at 43, 44.

The prime vehicle of this importation is Younger v. Harris.[13] Supplemented by Samuels v. Mackell, *supra*, the *Younger* doctrine makes it clear that *only* prosecutorial bad faith or harassment, or "perhaps other extraordinary circumstances"[14] will justify federal intrusion, by way of injunction, declaratory relief or, as here, "federal fact-finding," into a state criminal proceeding. The doctrine is not hortatory. Given the policies incarnate in the *Younger* rule, it would appear that we should sanction interference under the "extraordinary circumstances" exception only when absolutely satisfied that neither "comity" nor equitable principles of restraint will suffer. Analysis of Helfant's situation leaves me far from satisfied that such is the case here.

A. "Comity"

The concept of comity, though often invoked, tends to elude precise definition. Webster's dictionary offers a generic meaning—"mutual consideration between . . . equals." In the context of federal-state judicial relations, the meaning is more sharply etched. "Comity" is

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."[15]

Among the "state functions" of which a federal court should be particularly respectful is the administration of

13. It must be noted that the Supreme Court, in *Younger*, emphasized that the anti-intrusive spirit adumbrated there was not a departure from the Court's prior decisions. *See, e.g.*, Fenner v. Boykin, 271 U.S. 240 (1926); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Dombrowski v. Pfister, 380 U.S. 479 (1965).

14. Perez v. Ledesma, 401 U.S. 82, 85 (1971).

15. Younger v. Harris, *supra*, 401 U.S. at 44.

state criminal justice.[16] The recognition that administration of the criminal law is "intimately involved with sovereign prerogative"[17] should result in an extreme diffidence on the part of a federal court asked to intrude into the state criminal process. Diffidence may be dispelled where, as in cases of "bad faith" or "harassment," the criminal law is being utilized for other than its ordinary, legitimate purpose, or where the state is acting in flagrant disregard of the orderly processes of criminal justice. But when, as here, a criminal prosecution has been brought with the hope of obtaining a valid conviction, "comity" dictates that the federal courts indulge every presumption in favor of the state court's impartiality, orderliness and competence to decide federal questions.

While avowing its recognition of this notion of respect for state functions, the majority concludes that the presumption in favor of the state criminal justice system is punctured and deflated by the circumstances of this case. The majority's view distills to this: because the New Jersey Supreme Court exercises rather plenary "administrative power" over the lower state courts, and because certain of the Justices of the New Jersey Supreme Court itself were the alleged instrument of Helfant's "coercion," there is likelihood of partiality on the part of the state trial court that would, ordinarily, resolve the factual questions embodied in Helfant's Fifth Amendment claim.[18]

The erection and entertainment by this Court of the foregoing scenario, and its use as a justification for interfering in a state criminal proceeding, appears to me to be squarely in the teeth of the spirit of comity expressed in

16. *See* Railroad Comm'n v. Pullman, 312 U.S. 496, 500 (1941). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction*, 1973 Ariz. St. U.L.J. 557, 572 (1973).

17. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959).

18. Of the Justices that were on the New Jersey State Supreme Court at the time of the incident referred to in Helfant's complaint, only four remain as members of the Court, and more specifically the Chief Justice, who exercises the administrative supervision referred to in the majority opinion, has since retired.

Younger. The scenario presumes, for example, that the state trial judges act with a constant eye on the New Jersey Supreme Court, seeking not to apply the law fairly but to preserve or advance their own interests by a devious, obsequious sycophancy. It seems to postulate, further, that the New Jersey Supreme Court itself might be so venal and vindictive as to mete out some administrative "punishment" in the event that a trial court determined that Helfant had been "coerced." Finally, the majority's view overlooks what is the case in the federal system as well as in the states—that courts are sometimes asked to resolve controversies in which a party holds some power to affect adversely the very judges who are deciding the dispute.[19] In such instances, there is not imputed to the federal courts a hint of partiality. "Mutual respect among equals"—the generic definition of "comity"—would seem to demand, then, that no such imputation be made concerning the state courts either.

The majority, perhaps in recognition of the harsh light in which their decision might seem to cast the New Jersey courts, try to meliorate the implications of their opinion by speaking in terms of the mere "appearance" of a less than impartial state court process.

In sum, the majority's assertion that the possible "appearance of a biased [state] decision" warrants federal intrusion smacks of the federal high-handedness that section 2283 and *Younger* were fashioned to prevent. In my view, the spirit of comity, properly conceived and applied, would be reason enough to reject Helfant's plea for federal relief at this stage of the controversy.[20]

19. To cite an obvious example, federal courts quite often assess the constitutional validity of Congressional legislation. Congressmen, of course, may grant or withhold a salary increase to federal judges at any time. There thus exists something of an economic motivation for a federal judge to be less than impartial in reviewing federal legislation. Yet I do not think the probity of a federal court decision may be properly questioned on such basis.

20. Only recently, a three-judge federal district court sitting in New Jersey rejected the notion that the New Jersey state courts are incapable of fairly adjudicating issues implicating their own state Supreme Court. In American Trial Lawyers Ass'n. v. New Jersey Supreme Court, No. 64-72

B. "Great and Immediate" Harm

A crucial aspect of *Younger's* limitation upon incursions into state proceedings is the concept that federal interference may be sanctioned, if at all, only when the alleged unconstitutional harm will be "both great and immediate."[21] This teaching has its genealogy in traditional precepts of equitable restraint.[22] A consideration of the facts of the present dispute shows that, even were it the case that Helfant had been "coerced" into testifying, any harm resulting from that coercion would not be "immediate"—a *sine qua non* of federal relief.

The majority, having correctly determined that there is no basis in law for an outright injunction against Helfant's prosecution, concludes that if the facts are as Helfant alleges, declaratory relief should issue to the effect that the "coerced" testimony may not be introduced at Helfant's trial. The edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the state will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing. At oral argument, counsel for the state represented to this Court that Helfant's grand jury testimony will be used, if ever, *only* to impeach any inconsistent statements Helfant might utter should he take the witness stand.[23] The

20. (Cont'd.)
(D. N.J., June 20, 1972), where there was attacked by a bar association a rule promulgated by the Supreme Court setting forth the ground rules for contingent fees, the district court in rejecting the complaint stated:

> "Rather [plaintiffs] emphasize that by leaving [their claims] to the state courts they ultimately must have their cause decided by the same body which took the action they attack. Admittedly, this is so. Nevertheless, we cannot conclude that the state courts will listen with deaf ears to plaintiffs' challenge simply because plaintiffs attack the rulemaking authority of the State Supreme Court."

21. Younger v. Harris, *supra*, 401 U.S. at 46; Fenner v. Boykin, *supra*, 271 U.S. at 243.

22. Fletcher v. Bealey, 28 Ch. 688 (1885). *See* Story, Equity Jurisprudence 377 (1919).

23. The colloquy at oral argument between the Court and counsel for New Jersey was as follows:

> Judge Aldisert: Is the state representing to this federal court that it does not intend to and will not use the testimony elicited from the plaintiff at the grand jury proceeding?

"harm" that the majority's decision seeks to avert is thus conjectural, depending for its very existence upon events that may never occur. Consequently, the majority's result tends to ignore or flout the "great and immediate" requirement.

Another point should be mentioned briefly here. Helfant was indicted for three "substantive" offenses,[24] as well as for false swearing before the grand jury. Insofar as the false swearing counts are concerned, it would appear that Helfant's grand jury testimony will be admissible in evidence in any event, even if it should be determined that that testimony was "coerced." The Supreme Court, and this Court as well, have held that the Fifth Amendment does not confer upon a witness the privilege to lie while under oath.[25] Thus, though "coerced" testimony may not be used to establish Helfant's commission of "substantive" offenses, it would appear that the state may use it to prove that he swore falsely.

The majority's disregard of the "great and immediate" limitation thus emerges in sharp focus. There is no reasonable assurance that Helfant's grand jury utterances will *ever* be introduced at trial of the substantive counts, and there is a positive indication that Helfant can

23. (Cont'd.)

A. At this time there is no present intention of using that testimony. But were the appellant to take the stand, were his testimony to deviate in strong terms, that testimony then, of course, under Harris v. New York, might well be . . . .

JUDGE ALDISERT: . . . [N]ow we do not have as strong a position that I thought we had a minute ago.

* * * * *

JUDGE ALDISERT: The question now comes if the plaintiff is not entitled to federal court protection of an asserted constitutional right at this time, at what time could he possibly have federal protection if an issue at stake is the possible bias of a state court system?

A. Were the state to seek to introduce the grand jury testimony as a declaration against penal interests, for the purpose of argument, perhaps the appellant might have standing to come into this Court.

24. The three "substantive" state offenses with which Helfant is charged are conspiracy, obstructing justice, and aiding in the compounding of a crime.

25. *See* United States v. Knox, 396 U.S. 77 (1969); Glickstein v. United States, 222 U.S. 139 (1911); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). *See also* United States ex rel. Annuziato v. Deegan, 440 F.2d 304 (2d Cir. 1971).

suffer no unconstitutional harm at all by introduction of his testimony at trial of the false swearing counts. The equitable doctrine that harm must be imminent before an injunction will issue against a state criminal proceeding—a precept whose substance is an integral part of the doctrine of federal non-intrusion—is, therefore, disregarded by the result the majority reaches.[25a]

C. "IRREPARABLE INJURY" AND "ADEQUATE REMEDY AT LAW"

Among the central limiting principles of equity jurisprudence is the maxim that equity will act only when there is no adequate remedy at law.[26] This notion, too, has its roots in the historical bifurcation—and the resultant conflict—between courts of law and of equity.[27] The requirement that a plaintiff show "irreparable injury" before an injunction will issue is but an alternative statement of the "adequate remedy" rule.

Younger emphasizes that the "adequate remedy" rule is to be given rigorous application when a federal court is asked to interfere in an ongoing state criminal proceeding. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial:

> "Certain types of injury, in particular the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves, be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." [28]

Even prior to *Younger* the Supreme Court had explained, in forceful language, why challenges to certain

25a. *See* O'Shea v. Littleton, *supra*, 414 U.S. at 498.

26. O. Fiss, Injunctions 9 (1973).

27. *Id.* at 12. *Cf.* Story, Equity Jurisprudence 375-80 (1919).

28. Younger v. Harris, *supra*, 401 U.S. at 46; *see also* Watson v. Buck, 313 U.S. 387, 400 (1941).

types of unconstitutionality would not ordinarily support federal interruption of a state criminal trial. First, the state criminal process is presumed to be an "adequate" channel for vindicating federal rights. Second, if federal relief were granted in the midst of a state criminal proceeding,

> "[e]very question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum . . . to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities . . . to subvert the orderly, effective prosecution of local crime in local courts."[29]

This exposition by the Supreme Court of the underpinnings of the adequate remedy doctrine makes plain that, besides honoring tenets of equitable restraint, the adequate remedy rule advances and protects the concept of federal-state comity. The requirement that there be no adequate remedy at law is thus strengthened by *Younger's* explicit and implicit re-invigoration of "a proper respect for state functions."[30]

The sanctioning of federal relief at this stage of Helfant's prosecution practically undermines the "adequate remedy" precept. What Helfant seeks, and what the majority would permit, is a federal declaration in the middle of a state criminal trial to the effect that certain evidence

29. Stefanelli v. Minard, 342 U.S. 117, 123-24 (1951) (footnotes omitted); *see also* Cleary v. Bolger, 371 U.S. 392, 397 (1963).

30. 401 U.S. at 44. It is significant to note that Justice Brennan, writing for the majority in Dombrowski v. Pfister, *supra*, 385 U.S. at 485 n.3, adverted to a situation closely analogous to that presented in this case. He said:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

was unconstitutionally obtained, and so is inadmissible in the state court. To my mind, this situation so closely resembles that adverted to in *Stefanelli, supra,* that there is little justification for denominating this an "extraordinary situation" and shelving the restraints on our remedial powers. A criminal prosecution, followed by appeal and petition for certiorari, is presumed to be an adequate remedy for the constitutional deficiencies Helfant alleges. The "inadequacy" the majority perceives is, of course, the asserted involvement of the New Jersey Supreme Court. However, as we have seen, that very claim of "inadequacy" is itself in derogation of the program of comity.

Moreover, there is an alternative federal remedy available to Helfant if the need for it should ever arise, a remedy which would provide an opportunity for the sort of "federal fact finding" adverted to by the majority. Yet, this alternative remedy—habeas corpus—would not cause so severe a wrench to federal-state relations as the one advanced by the majority. Should Helfant lose his Fifth Amendment claims in the state courts and receive a custodial sentence,[31] he may seek a writ of habeas corpus. The habeas statute would appear to require full federal fact finding on Helfant's "coercion" claim,[32] given the circumstances Helfant alleges.

Again, the dominant chord of *Younger,* requiring as it does that we pay scrupulous heed to the adequacy of state remedies and alternative federal remedies, appears to have been abridged by the majority's decision. And

31. *See* 28 U.S.C. § 2254; United States ex rel. Dessus v. Pennsylvania, 452 F.2d 557 (3d Cir. 1971), *cert. denied,* 409 U.S. 854 (1972).

32. 28 U.S.C. § 2254(d) provides in part that in federal district courts, upon an application for *habeas,* prior state-court findings of fact "shall be presumed to be correct" unless:

> "(2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or
>
> "(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> "(7) . . . the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

certainly, when the "adequate remedy" rule, the requirement of "great and immediate" harm, and the cardinal principle of comity are considered together, the sanctioning of federal interference in this case cannot be justified.

D. "Extraordinary Circumstances"

The assumption that there exists an "extraordinary circumstance" exception to *Younger's* interdiction is grounded in the language of the *Younger* opinion itself. There, the Supreme Court said:

> "There *may*, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." [33]

But the Court immediately proceeded to point to an illustration of what such circumstances might be, quoting from Watson v. Buck: [34]

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." [35]

No other delineation of the contours of the "extraordinary circumstances" exception has yet been undertaken by the Supreme Court. Indeed, scattered statements by the Court seem to indicate doubt on the part of some of the Justices that any such exception exists at all. Thus in Perez v. Ledesma,[36] for example, decided on the same day as *Younger*, Justice Black was willing to say only that "*perhaps* in . . . extraordinary circumstances where irreparable injury can be shown is federal . . . relief against

33. 401 U.S. at 53 (emphasis added).
34. 313 U.S. 387 (1941).
35. *Id.* at 402.
36. 401 U.S. 82 (1971).

pending state prosecutions appropriate." [37] And only recently, in Allee v. Medrano,[38] Chief Justice Burger, joined by two other members of the Court, offered a reading of *Younger* that seems to leave no room for any extraordinary circumstances exception:

> "To meet the Younger test the federal plaintiff *must* show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts." [39]

While it cannot be said that these statements affirmatively establish that there is no "extraordinary circumstances" exception, they do indicate that uncertainty exists concerning what circumstances, if any, will warrant federal intrusion under that circumscribed exception. Absent a clear benchmark to guide us in identifying "extraordinary circumstances," we should hew closely to the concepts of equitable restraint and comity, concepts which, after all, *Younger* was designed to preserve, protect and perpetuate.

E. Practical Considerations

Thus far, I have sought to point out how historical and doctrinal considerations weigh against a federal incursion into the midst of Helfant's state prosecution. But more is called for in this case than "a merely doctrinaire alertness to protect the proper sphere of the states in enforcing their criminal law." [40] A glance at pragmatics and at the realities of time and cost emphasize how damaging to federal-state relations the majority's decision may prove.

37. *Id.* at 85.
38. — U.S. — (May 20, 1974).
39. Slip opinion at 16 (Burger, C.J., concurring and dissenting).
40. Stefanelli v. Minard, *supra*, 342 U.S. at 123.

Helfant was first subpoenaed to appear before the state grand jury in October of 1972. On January 17, 1973, an indictment was returned, charging Helfant with the commission of crimes that occurred as early as 1968. It has now been more than a year-and-a-half since New Jersey has been thwarted from proceeding with the prosecution because of the federal intervention sought by Helfant. During that time, a critical witness has died and the administration of the prosecutor's office has changed. The prospect now is for further delay, since "fact finding" has been ordered in the district court, and because there is the possibility of another appeal to this Court from the fact finding proceeding. It is, therefore, not unlikely that a two-year suspension in the state prosecution will result. A delay of such duration in a state criminal proceeding, sanctioned by a federal court, and predicated solely on a challenge to the admissibility of evidence—evidence that may never be offered—would certainly seem to be an "insupportable disruption."[41] This is particularly true in these times when special efforts are being made to expedite criminal proceedings.[42]

Looming large among the doctrinal premises of Younger, of section 2283, and of the recent proliferation of commentary justifiably decrying the "denigration of state courts,"[43] is the idea that, for our federal system to function as it ought, the states must be accorded a full measure of dignity, respect and confidence. When a federal court, on the occasion of a criminal defendant's objection to evidence, imposes a substantial impediment upon a state criminal trial, little is done to enhance the prestige of either court, state or federal.

What is at stake in this case is the need to strike a balance between the regimen of non-intrusion on the one

41. *Id.*

42. *See, e.g.*, Rule 50(b), Federal Rules of Criminal Procedure; ABA Project on Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968).

43. Aldisert, *supra*, at 573.

hand, and a citizen's right to federal disposition of his federal claims on the other. The two are not irreconcilable. Helfant, under the view expressed in this dissent, could have his day in federal court by certiorari or by habeas. And, of course, by declining to permit federal interference now we would save to the state its sovereign prerogative to try an accused without delay. The majority's solution of the problem, however, disrupts and disdains the state process for no other reason than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy. Comity thus suffers, not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated ***instanter***.

For all of the reasons set forth, I dissent, and would affirm the judgment of the district court.

Judges Van Dusen and Weis join in this dissenting opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order Granting Rehearing *En Banc*, dated January 11, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

Present:

SEITZ, *Chief Judge*, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

A majority of the active Judges having voted for rehearing en banc in the above-entitled case,

It is ORDERED that the Clerk of this Court list the above case for rehearing before the Court en banc at the convenience of the Court.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: January 11, 1974

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing *En Banc*, dated October 31, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

Present:

SEITZ, *Chief Judge*, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

ORDER

The Petition for Rehearing filed by the defendants-appellees having been submitted to the judges who par-

Order Vacating Judgment Granting Petition for Rehearing and Denying Petition for Rehearing En Banc dated October 31, 1973

ticipated in the decision of this court and to all other available circuit judges of the Circuit in regular active service, and the judges who concurred in the decision of the panel which heard the appeal having voted for panel rehearing,

It is Ordered that the Petition for Rehearing en banc is denied, and it is further

Ordered that the judgment of this court dated September 10, 1973 be and is hereby vacated, and the Clerk of this Court shall list this appeal for submission to a panel consisting of Judges Staley, Adams, and Gibbons pursuant to Rule 12(6) on November 19, 1973, and it is further

Ordered that the parties shall, simultaneously, on or about November 10, 1973 file with the court supplemental briefs on the question whether, assuming appellant's testimony before the grand jury was coerced, he has standing on that ground to object to a trial on Indictment No. SGJ-10-72-10 or on any count thereof. *See Gelbard* v. *United States,* 408 U. S. 41, 60 (1972); *United States* v. *Blue,* 384 U. S. 251 (1966); *Lawn* v. *United States,* 355 U. S. 339 (1958); *compare Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

By the Court,

John J. Gibbons
Circuit Judge

Dated: October 31, 1973

Certified Judgment in Lieu of Mandate, dated September 10, 1973

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 73-1386

Edwin H. Helfant,

Appellant,

vs.

George F. Kugler, Attorney General of the State of New Jersey, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey, Chief Justice Joseph A. Weintraub, Associate Justices Nathan L. Jacobs, Haydn Proctor, Frederick W. Hall, Worrall F. Mountain, Jr., and Mark A. Sullivan, of the Supreme Court of New Jersey, and The State of New Jersey,

Appellees.

(D. C. Civil Action No. 607-73)

On Appeal From the United States District Court
For the District of New Jersey

Present:

Staley, Adams and Gibbons, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Certified Judgment in Lieu of Mandate, dated September 10, 1973

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which order dismissed the complaint for failure to state a claim upon which relief could be granted, be and hereby is reversed. The order of May 9, 1973, of the said District Court which order denied plaintiff's motion for a preliminary injunction be and hereby is vacated and the cause remanded to the District Court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits, and it is directed that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this Court, all in accordance with the opinion of this Court.

ATTEST:

THOMAS P. QUINN
Clerk

September 10, 1973

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 7, 1973

Before:

STALEY, ADAMS and GIBBONS, Circuit Judges

PERSKIE & CALLAHAN, ESQS.
By: MARVIN D. PERSKIE, ESQ.
PATRICK T. MCGAHN, JR.
3311 New Jersey Avenue
Wildwood, New Jersey 08260
Attorneys for Appellant

GEORGE F. KUGLER, JR., ESQ.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attorney for Appellees

OPINION OF THE COURT

(Filed—September 10, 1973.)

PER CURIAM

This is an appeal from an order of the district court which (1) denied plaintiff's motion for a preliminary injunction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state, and (2) granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, but in view of its ruling on the defendants' motion made no findings of fact.

The plaintiff-appellant Helfant is a member of the New Jersey bar and a former municipal court judge of that state. His verified complaint alleges:

"4. Some time before October 18, 1972 the State of New Jersey began a State Grand Jury Investi-

gation, inter alia, into an alleged illegal withdrawal on an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the plaintiff was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.

5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the United States Constitution and refused to testify.

6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the

Supreme Court in their private chambers at 10 minutes before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff

about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy At-

torney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgship, but his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation."

The complaint also alleges:

"14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitution-

> al rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him."

Insofar as this appeal reviews the order dismissing Helfant's appeal for failure to state a claim upon which relief may be granted these factual allegations must be taken as true.

The opposing affidavits filed by the state defendants in opposition to Helfant's motion for a preliminary injunction do not dispute any of the historical factual allegations of the Complaint quoted above, except that defendant Hayden avers:

> "I had no knowledge that Helfant was to appear before the New Jersey Supreme Court until I was called by the Supreme Court on November 6, 1972 and told that Helfant might be a few minutes late for his grand jury appearance."

Read in the light most favorable to those defendants, the affidavits do tend to suggest that Helfant's testimony before the grand jury was the result of a voluntary waiver of his privilege against self incrimination rather than of any compulsion by the Supreme Court. It is fair to say that for purposes of the motion for a preliminary injunction, whether Helfant's testimony was the result of

compulsion was put in issue and that this issue could be resolved only by an evidentiary hearing.

At the evidentiary hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and testified himself. On the disputed issue of compulsion to testify before the grand jury this testimony by Helfant is relevant:

> "Q. Now you went to Trenton on November the 8th in the company of your two attorneys? A. Both you and Mr. McGahn.
>
> Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton? A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?
>
> Q. When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not? A. Yes.
>
> Q. And you were subsequently ushered into the Supreme Court private Chambers? A. Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Peskoe took me from her office to the Supreme Court Chambers or conference room, not the Chambers.
>
> Q. Conference Room. Do you know how many Judges were there? A. To my knowledge one judge,

I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q. Were they sitting in their robes? A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in? A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q. Now were they sitting down, the Judges? A. Yes, they were seated.

Q. Were you standing or— A. Mr. Perskie, I don't remember if they told me to be seated or if I was standing up.

Q. And what was your state of mind and your feelings as you entered those Chambers? A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can? A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation? A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond? A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice? A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court? A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out— A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today? A. And what did you tell him? A. I said, Mr. Chief Justice, I am going to testify."

The district court denied preliminary relief and dismissed the complaint on the ground that *Younger* v. *Harris,* 401 U. S. 371 (1971) precluded federal intervention. In the posture in which the case is before us, the district court has ruled only on the legal sufficiency of the complaint, and has not made any findings of fact. Whether or not Helfant's testimony before the grand jury was voluntary or coerced is a crucial fact issue. Although no testimony was offered by the state defendants, on that crucial fact issue the district court, had it made factual findings, might have found Helfant's testimony not credible, and might on this ground have declined to issue a preliminary injunction. But for purposes of a motion to dismiss pursuant to Rule 12(b)(6) that possibility is irrelevant. In reviewing the order granting that motion we must take as true Helfant's contention that he was

coerced by the Supreme Court of New Jersey into testifying before the grand jury and that he is about to be tried on an indictment resulting from that coerced testimony. The record establishes that a trial court has declined to quash the indictment and that attempts to obtain interlocutory appellate relief in the New Jersey courts have been unavailing. Even if at a later stage a New Jersey trial court were to quash the indictment the state could appeal that decision to the Supreme Court of New Jersey. *See, e.g., State* v. *Winne,* 12 N. J. 152 (1953).

Younger v. *Harris, supra,* holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or ". . . other extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris, supra,* 53. *See Lewis* v. *Kugler,* 446 F. 2d 1343 (3d Cir. 1971); *Conover* v. *Montemuro,* 447 F. 2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the *Younger* v. *Harris* line of cases is predicated upon the fundamental assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced

from him by the Supreme Court of New Jersey, his fifth amendment privilege against self incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey, and ultimately in that Court, hardly seems adequate.

We hold, then, that *Younger* v. *Harris, supra* did not require the dismissal of the complaint. That holding requires a reversal and remand.

The order denying the preliminary injunction is also predicated upon *Younger* v. *Harris, supra.* We did not hear the testimony of Mr. McGahn and Mr. Helfant, and we cannot judge the credibility of Helfant's testimony that he was coerced. At the same time, on the record before us his testimony is not contradicted except by affidavits, and those affiants have not been cross examined. The record is sufficient to suggest that the status quo be preserved until such time as the district court can make findings of fact. Mindful that present or even potential interference with a pending state prosecution is a matter of utmost gravity, this case should on remand receive accelerated consideration and the court should enter an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits. Rule 65(a)(2) Fed. R. Civ. Proc.

At the oral argument on this appeal we asked the attorney for the appellees if the State intended to commence the trial of the indictment, now scheduled for September 10, 1973, while this appeal was *sub judice.* We were advised that this was the State's intention. Accordingly we

issued an order enjoining commencement of the prosecution until such time as we could decide the appeal.

The order dismissing the compiaint will be reversed. The order denying the motion for a preliminary injunction will be vacated, and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits. We direct that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this court. The mandate of this court shall issue forthwith.

ARLIN M. ADAMS, *Circuit Judge,* concurring:

I concur in the result reached by the majority in this matter. Although the doctrine of *Younger* v. *Harris* generally precludes a federal district court from enjoining a criminal proceeding already under way in the state court, there are limited exceptions to this wise rule of comity. One of those exceptions, as I read *Younger,* arises when "extraordinary circumstances" or "unusual circumstances," 401 U. S., at 53 and 54, exist. As the recitation set forth in the majority opinion demonstrates, it would seem to me that such extraordinary or unusual circumstances are asserted here so as to make it appropriate for the district court to proceed with findings of fact and conclusions of law.

The plaintiff claims, both in his pleadings and in his evidence, that he was coerced by members of the State

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that as a result, he was indicted because of his allegedly coerced testimony. He sought, in the state court, to have the indictment dismissed because it was based on the coerced testimony, but his motion was refused, and the state appellate courts declined to entertain his appeal.

If the district court should determine, after an appropriate evidentiary inquiry, that this plaintiff's Fifth Amendment right *has* been abridged, in the factual setting of this case an exception to Younger's precept of non-interference would obtain.[1]

[1] Although the plaintiff names as defendants the Justices of the Supreme Court of New Jersey as well as that State's Attorney General, the final injunction, if issued, may be limited to the Attorney General, prohibiting him from continuing criminal proceedings against plaintiff. It should also be noted that plaintiff does not seek money damages.

Order of United States District Court for the District of New Jersey Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 607-73

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, *et als.*,

Defendants.

This matter having been opened before the Court by Marvin D. Perskie and Patrick T. McGahn, Jr., co-counsel for the plaintiff, Edwin H. Helfant, an Application for an Injunction against a State Court criminal proceeding under 42 United States Code Annotated Section 1983 and under 28 United States Code Annotated Section 1343, and cross motion having been made by the defendants to dismiss the complaint on the grounds that the court does not have jurisdiction and on the grounds that the complaint does not state a claim upon which reilef can be granted, and coming on to be heard in the presence of Edward C. Laird, Deputy Attorney General of the State of New Jersey, attorney for the defendants, and argu-

Order of United States District Court for the District of New Jersey Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973

ment having been considered together with briefs, affidavits, certified pleadings and oral testimony having been heard,

It Is, on this 9 day of May, 1973

Ordered and Adjudged that the United States District Court for the District of New Jersey has jurisdiction over the subject matter.

It Is Further Ordered and Adjudged that the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted be and is herewith Granted. Application for stay pending appeal is denied.

John J. Kitchen
Judge, U. S. District Court

I consent to the entry of the above Order.

Edward C. Laird
Deputy Attorney General

I consent to the form of the above Order.

Marvin D. Perskie
Co-Counsel for Plaintiff, Edwin H. Helfant

Oral Opinion of the Honorable John J. Kitchen, U.S.D.J., Dismissing Complaint, dated May 9, 1973

The Court: Gentlemen, after considering the briefs and the affidavits submitted by the parties, and the oral arguments of counsel and testimony, this Court has determined that the plaintiff's petition to preliminarily enjoin the pending State Criminal Prosecution against him should be and is hereby denied.

Although this Court has jurisdiction in a suit brought under the 1938 Section to issue an injunction against a State Criminal Proceeding under the recent case of Mitchum, but in my opinion the plaintiff has failed to establish that federal intervention here is permissible under the guidelines of Younger versus Harris.

Younger and its companion cases set out a narrow exception to the broad and well settled policy that Federal Equity Courts should not intervene into pending State Criminal Proceedings.

They set out, in order for the federal intervention to be proper, Younger holds that the plaintiff must establish that the State Prosecution was brought in bad faith in order to harass the defendant. Second: That the irreparable harm to the defendant must be both great and immediate and must be more than those injuries that are usually incidental to every criminal proceeding. Third: That the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Although this case does not present a challenge to the constitutionality of a State Statute, Younger does apply since the focus of Younger on intervening in pending State Criminal Proceedings which is exactly the relief sought here.

Oral Opinion of the Honorable John J. Kitchen, U.S.D.J. Dismissing Complaint, dated May 9, 1973

Applying the above guidelines of Younger to the facts of this case, the Court finds that the allegations by the plaintiff do not establish that the prosecution was initiated in bad faith for the purpose of harassing the plaintiff, nor for the alleged purpose of coercing the plaintiff to involuntarily relinquish his Fifth Amendment rights against self incrimination in order to obtain indictments against him for false swearing. From the record before this Court, it appears that the prosecution of the plaintiff grew out of an on-going State Grand Jury Investigation into alleged acts of misconduct that had been initiated prior to the incidents alleged by the plaintiff.

The plaintiff has failed to establish irreparable harm which is both great and immediate. The only harm alleged by the plaintiff is that harm incidental to the defense of a criminal prosecution. The defense of a criminal charge based on an indictment that is alleged to be constitutionally defective does not amount to that degree of harm required as one of the prerequisites to Federal Injunctive Relief.

The plaintiff's defense to the state criminal charge against him does afford him an adequate method to seek vindication of his constitutional rights. For this Court to hold otherwise, this Court would have to assume that the State Trial and Appellate Courts would not review plaintiff's contention impartially and fairly; an assumption which this Court is not willing to make.

In addition, the defendant's motion to dismiss the complaint for lack of jurisdiction is also denied, however, because the only relief requested in the complaint is injunctive, the defendant's motion to dismiss for failure to state a claim is hereby granted.

Oral Opinion of the Honorable John J. Kitchen, U.S.D.J. Dismissing Complaint, dated May 9, 1973

You may prepare the order Mr. Laird.

Mr. Perskie: Could we obtain a temporary restraint pending the making of appeal to the Circuit Court?

The Court: No, I won't do that Mr. Perskie.

All right. Court's adjourned.

Verified Complaint, dated May 2, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO.

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Defendants.

The plaintiff, Edwin H. Helfant, residing at Green Lantern Motel, Somers Point, Atlantic County, State of New Jersey, by way of complaint says:

1. Plaintiff is a citizen of the United States and resides in Atlantic County, New Jersey. All defendants herein are residents of the State of New Jersey.

2. Defendants, George F. Kugler, Attorney General of the State of New Jersey, Joseph A. Hayden, Jr., Deputy

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Attorney General of the State of New Jersey, Chief Justice Joseph A. Weintraub, Associate Justices Nathan L. Jacobs, Haydn Proctor, Frederick W. Hall, Worrall F. Mountain, Jr., Mark A. Sullivan, of the Supreme Court of New Jersey and The State of New Jersey, deprived plaintiff of privileges and immunities guaranteed to every citizen of the United States, including plaintiff, by Amendment 5 and Section 1 of Amendment 14 of the Constitution of the United States, and by reason thereof, this Court has jurisdiction under 42 U.S.C.A., Section 1983 and 28 U.S.C.A. Section 1343.

3. The plaintiff herein, Edwin H. Helfant, is a member of the Bar of the State of New Jersey and a former municipal court judge.

4. Some time before October 18, 1972 the State of New Jersey began a State Grand Jury investigation, inter alia, into an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the defendant was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.

5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the U. S. Constitution and refused to testify. See attached exhibit.

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6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the Supreme Court in their private chambers at 10 minutes before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amend-

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ment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State

and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy Attorney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation.

10. To date, the Deputy Attorney General has not indicated what was the purpose for his immediately visiting the Supreme Court chambers after the plaintiff had left there, but on being confronted with the facts in open court, has resorted to an illusory "right of privacy" and an alleged right of interdepartment privilege and communication which is not only non-existent but violative of the basic constitutional concept of separation of power. (See attached exhibits.) Nor has this defendant denied his communications with the Supreme Court about plaintiff during a pending Grand Jury investigation, nor his revelation of raw Grand Jury evidence about plaintiff to them and his violating the secrecy of the Grand Jury, but has sought to justify same.

11. On January 17, 1973 an indictment was returned by the same State Grand Jury aforedesignated against the plaintiff herein, charging him with conspiracy, obstruction of justice, aiding and abetting the compounding of a crime, and *four counts of false swearing.*

12. On April 6, 1973 the Trial Court entered two orders denying plaintiff's previously made motions to dismiss the indictments and counts thereof, based upon the intrusion

of the Deputy Attorney General into the Supreme Court chambers, and his acquaintance of the New Jersey Supreme Court with the factual matters involved in a pending State Grand Jury investigation and the resultant coercive actions of both the Deputy Attorney General and the Supreme Court which deprived plaintiff of the voluntary exercise of his Fifth Amendment rights.

13. The plaintiff then filed two motions for leave to appeal the orders of the Trial Court aforesaid with the Appellate Division of New Jersey on April 16, 1973 and April 23, 1973 and a motion for leave to appeal these unheard motions and for certification from the Supreme Court on April 26, 1973.

14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of

his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. The conclusion must be that the State is engaging in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.C.A., Section 2283.

15. The plaintiff was arraigned on the Indictment SGJ 10-72-10 in this case on February 2, 1973. Trial on this indictment has been peremptorily set for May 14, 1973 and Trial Judge Arthur Salvatore has refused to grant any continuance for trial.

16. The State of New Jersey is made a party hereto so that complete relief may be afforded.

17. The plaintiff has been denied due process of law and fundamental fairness referable to the actions of the defendants herein.

18. Just today (May 2, 1973) there was received from the Deputy Attorney General a motion returnable on May 11, 1973 in Trenton, completely reversing his posi-

Verified Complaint dated May 2 1973

tion heretofore made during preliminary motions in this case with regard to the introduction of testimony of the co-defendant of the plaintiff in the criminal action in the State of New Jersey.

WHEREFORE, plaintiff demands judgment as follows:

a) A temporary and permanent injunction restraining defendants from further prosecuting or proceeding on any charges arising out of and including Indictment No. SGJ 10-72-10;

b) For a temporary restraining order restraining the defendants from prosecuting said charges insofar as they apply to plaintiff until this matter can be heard and determined, and

c) For any other relief the Court may deem just and fair.

MARVIN D. PERSKIE, ESQUIRE and
PATRICK T. MCGAHN, JR., ESQUIRE
Co-Counsel for Plaintiff
By: MARVIN D. PERSKIE

Dated: May 2, 1973

(Verified by Edwin H. Helfant on April 27, 1973.)

State of New Jersey Indictment

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—CRIMINAL

STATE GRAND JURY NUMBER SGJ 10-72-10

DOCKET NUMBER .....

INDICTMENT

STATE OF NEW JERSEY

v.

EDWIN H. HELFANT, SAMUEL MOORE

COUNT I

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; knowingly, willfully and corruptly did conspire, confederate and agree together, with each other, and with John Cantoni, Shelly Kravitz, John Anderson, Harold Garber, Richard Cantoni, also known as Babe, Dominick Perri

and William H. Hicks who are named as co-conspirators but not as defendants herein, to commit acts for the perversion and obstruction of justice and due administration of the laws; the said Edwin H. Helfant and the said Samuel Moore then and there knowing that a criminal complaint in the case of State v. John Cantone, Docket No. C-251 for 1968, was pending in the Municipal Court of the City of Egg Harbor City aforesaid, the said matter involving a charge that John Cantoni did commit atrocious assault and battery upon William H. Hicks and Eugene Summerson on March 17, 1968; and the said Samuel Moore then and there being the Municipal Court Judge in the City of Egg Harbor City; that is, knowingly, willfully and corruptly to use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court of Egg Harbor City, favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey, the County of Atlantic and the City of Egg Harbor City, thereby interfering with the goals and aims of the judicial process and denying the public the benefits and protections of the criminal laws of the State of New Jersey, to the obstruction, hinderance and impedance of the due course of public justice.

It was a part of the said conspiracy that William H. Hicks would withdraw the aforesaid complaint, drop the charge of atrocious assault and battery and not continue the criminal prosecution.

It was further a part of the said conspiracy that the said Samuel Moore would violate the duties of his judicial office which he was sworn and required by law to uphold, including the duties imposed by N.J.S.A. 2A:8-23, R.R. 8:4-10 of Court Rules, and the Municipal Court

Manual, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by willfully misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint.

The Grand Jurors aforesaid, upon their oaths, do further present that in execution of the said conspiracy and to effect the objects thereof, the following overt acts were committed:

OVERT ACTS

1. On or about March 17, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did communicate by telephone with Shelly Kravitz and then and there Edwin H. Helfant did tell Shelly Kravitz that he wanted to meet him the following day and discuss the assault by John Cantoni upon William H. Hicks which had occurred earlier that morning.

2. On or about March 18, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, and then and there Edwin H. Helfant did say that if John Cantoni paid the sum of $5,000 he would see to it that no charges were pressed.

3. On or about March 18, 1968, Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, did communicate with John Cantoni and did relate to him a conversation he had with Edwin H. Helfant.

State of New Jersey Indictment

4. On or about March 19, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, and then and there Edwin H. Helfant stated that if John Cantoni paid the sum of $3,000 charges would not be pressed for the assault by John Cantoni against William H. Hicks, but if the money were not paid he would personally prosecute the case before Judge Moore in Egg Harbor City.

5. On or about March 19, 1968, at the City of Atlantic City, in the County of Atlantic, Shelly Kravitz did meet with John Cantoni and did relate to him the conversation he had with Edwin H. Helfant earlier that day.

6. Between on or about March 29, 1968, and on or about April 21, 1968, at the City of Somers Point, in the County of Atlantic, Richard Cantoni, also known as Babe, did meet with Edwin H. Helfant and did discuss the payment of a sum of money by John Cantoni to Edwin H. Helfant in return for the withdrawal of the complaint filed against John Cantoni by William H. Hicks.

7. Between on or about April 21, 1968, and on or about June 5, 1968, John Cantoni did meet with Harold Garber at the Algiers Lounge at the City of Atlantic City, in the County of Atlantic, and then and there they did discuss the paying of money to Edwin H. Helfant by John Cantoni for the withdrawal of the complaint filed by William H. Hicks against John Cantoni.

8. At the end of May or the beginning of June, 1968, at the City of Atlantic City, in the County of Atlantic, John Cantoni did give $1,700 to John Anderson.

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9. On or about June 7, 1968, at the City of Somers Point, in the County of Atlantic, William H. Hicks did recieve a sum of money in the amount of $1,500 from Edwin H. Helfant.

10. Between on or about June 7, 1968, and on or about July 20, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel Moore did direct Alolph Joseph to write the words "We do hereby withdraw the within complaint against John Contoni" on the back of the complaint filed against John Cantoni by William H. Hicks, in the case of State v. John Cantone, Docket No. C-251 for 1968, and Samuel Moore did then take the complaint from the Municipal Court of Egg Harbor City.

11. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, William H. Hicks did sign his name on the back of the complaint he filed against John Cantoni charging Cantoni with atrocious assault and battery, in the case of State v. John Cantone, Docket No. C-251 for 1968, under the printing: "We do hereby withdraw the within complaint against John Cantone" and above the typing "William H. Hicks".

12. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did sign his name on the back of the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, over the typing "Witness as to Eugene Summerson".

13. On or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel

Moore did return the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, to Adolph Joseph, did show him the signature and typing on the back of the complaint and did tell Adolph Joseph that permission had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and that the signature over the typed lines "Witness as to William H. Hicks" and "Witness as to Eugene Summerson" were those of people from the Atlantic County Prosecutor's Office.

All in violation of N.J.S. 2A:98-1 and N.J.S. 2A:98-2, and against the peace of this State, the government and dignity of the same.

COUNT II

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City; and the said Edwin H. Helfant and Samuel Moore then and there knowing that a matter was pending in the Municipal Court for the City of Egg Harbor City, the said matter involving a criminal complaint which was filed by William H. Hicks and Eugene Summerson against John Cantoni charging atrocious assault and battery, in the case of State v. John Cantone, Docket No. C-251 for

1968; and the said Edwin H. Helfant and Samuel Moore contriving and intending to obstruct, hinder and impede the due course of public justice and the due administration of laws in the said matter; willfully, knowingly and corruptly did use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court for the City of Egg Harbor City favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey in the said matter, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by intentionally misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; to the obstruction, hinderance and impedance of the due course of public justice; all in violation of the provisions of N.J.S. 2A:85-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT III

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court, the said Edwin H. Helfant then and there

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knowing that a criminal complaint was pending in the Municipal Court of Egg Harbor City aforesaid, in the case of State v. John Cantone, Docket No. C-251 for 1968, the criminal complaint charging that John Cantoni did commit atrocious assault and battery upon the said William H. Hicks and Eugene Summerson at the City of Egg Harbor City, on March 17, 1968, in violation of N.J.S. 2A:90-1, the said allegation that John Cantoni committed atrocious assault and battery upon William H. Hicks and Eugene Summerson being a true, accurate and valid charge of an offense indictable at law in New Jersey, did willfully and knowingly aid, abet, counsel, command, induce, procure, and cause William H. Hicks to accept, take, and receive a sum of money to compound an indictable offense under the laws of the State of New Jersey, that is, for William H. Hicks to withdraw the aforesaid complaint, to drop the charges and not to continue the criminal prosecution for the said indictable offense in return for the receipt by him of a sum of money, in violation of N.J.S. 2A:97-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT IV

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court, the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City, aforesaid, and the said Samuel Moore then and there having by reason of such public office the duties, among others,

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to display good faith, honesty and integrity and to be impervious to corrupting influences, and to enforce the laws of the State of New Jersey to the best of his ability, uninfluenced by motives adverse to the best interests of the City of Egg Harbor City, the County of Atlantic, and the State of New Jersey, to transact the business of his said public office frankly and openly in the light of public scrutiny so that the public may know and be able to judge him and his work fairly; to abide by the commands in the Canons of Judicial Ethics to promote justice, to conduct himself above reproach, to administer justice according to law and not to allow other affairs or private interests to interfere with the prompt and proper performance of his judicial duties; and to abide by N.J.S. 2A:8-23, and the 1968 New Jersey Court Rules, R.R. 8:4-10, and the Municipal Court Manual requiring that a complaint pending in a municipal court wherein an offense indictable at law is charged not be discharged and dismissed without giving the County Prosecutor prior notice and an opportunity to be heard; did knowingly, willfully, and corruptly engage in misconduct in his said public office; that is, the said Samuel Moore did breach and violate the aforesaid duties by using the power and influence of his said public office to obtain action in the Municipal Court of the City of Egg Harbor City favorable to John Cantoni and against the interests of the State of New Jersey, the County Atlantic and the City of Egg Harbor City, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of a complaint charging atrocious assault and battery, a high misdemeanor and an indictable offense, in the case of State v. John Cantone, Docket No. C-251 for 1968, without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic

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County Prosecutor with an opportunity to be heard; and by misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; in violation of N.J.S. 2A:85-1, and against the peace of this State, the government and dignity of the same.

COUNT V

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on October 25, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing in the manner and form following to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-17) and obstruction of justice (N.J.S. 2A:85-1), and which investigation the Grand Jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Samuel Moore was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the foreman thereof, the said Samuel Moore then and there taking the oath that the evidence which he should give to the State Grand Jury should be the truth, the whole truth and nothing but

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the truth, and the foreman then and there having competent authority to administer such oath to the said Samuel Moore in that behalf.

3. Upon the said Samuel Moore being sworn, it was then and there inquired about the knowledge of the said Samuel Moore about a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, and the manner in which the aforesaid complaint was dismissed without the approval or the knowledge of the Atlantic County Prosecutor's Office.

4. In reference to the aforementioned matter under inquiry the said Samuel Moore then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in effect that in 1968 he had no knowledge of and did not participate in the disposition of the aforesaid complaint, that is, that he never saw the aforesaid complaint, that he never directed Adolph Joseph to make any writing on the back of the complaint, that he never took the complaint from the Municipal Court of the City of Egg Harbor City, that he never told Adolph Joseph that approval had been given by the Atlantic County Prosecutor's Office to dismiss the complaint and that he never authorized the dismissal of the aforesaid complaint, as follows:

> Q. Did you in June of 1968 instruct Ady Joseph to write, "We do hereby withdraw the within complaint against John Cantoni"?
>
> A. Oh, no, impossible.
>
> Q. You are absolutely certain?
>
> A. Absolutely impossible. I couldn't possibly do such a thing.

Q. You never saw this complaint before—

A. August of this year.

Q. You never instructed Mr. Joseph to print, "We do hereby withdraw the within complaint against John Cantoni"?

A. No, sir.

Q. Did you after instructing Mr. Joseph to do that printing, follow the complaint up?

A. What was that?

Q. I said, did you, after having instructed Mr. Joseph to print it—

A. I didn't do such a thing.

Q. Did you—okay, strike that, excuse me.

Did you ever, after showing the complaint to Mr. Joseph follow the complaint up?

A. I didn't see the complaint until August of this year. I just testified that I did not see these papers until August of this year. So I couldn't possibly have talked to Mr. Joseph or directed him to do anything as far as these papers are concerned.

Q. Judge, I'm going to ask the questions and you, if you didn't do it, you could say you did not do it.

A. Yes, sir.

Q. Did you ever follow that complaint up and tell Mr. Joseph you were going to take it to the Atlantic County Prosecutor's Office to have them authorize the withdrawal of that complaint?

A. No, sir.

Q. Did there ever come a time, Judge Moore, that in July of 1968 Mr. Joseph asked you what happened to the complaint, that in June you told him you were going to take it to the prosecutor's office, and you told him you forgot about it, but that you will get the authorization from the prosecutor's office?

A. That's a deliberate lie if that were said.

Q. Judge Moore, did there ever come a time in September of 1968 where you brought that complaint back and told Mr. Joseph that the complaint had been withdrawn by Hicks and Summerson and that those were their signatures?

Excuse me, on the right-hand side, William Hicks and Eugene Summerson and the signature witness as to Hicks and the witness as to Summerson was the authorization from the Atlantic County Prosecutor's Office to withdraw the

A. Anybody who made that statement, it's a deliberate lie. I'm one of the few people, and probably the only one who can recognize Helfant's signature. That's his signature there.

If I had anything to do with the complaint and these signatures, I certainly wouldn't stand for Helfant, a municipal judge, signing as a witness for dismissing an indictable offense, which would be improper. I can't understand Helfant's doing such a thing. That's stupidity.

Q. Judge, again, just to get your—what appears to be your denial on the record—did you tell Mr. Joseph that you received authorization from the Atlantic County Prosecutor's Office to withdraw the complaint and that the signatures on the left-hand side of the complaint, witness as to William H. Hicks, witness as to Eugene Summerson dated July 20, 1968 were the signatures of the prosecutor's office authorizing the withdrawal of the complaint?

A. No.

Q. No, sir, you do not?

A. No, sir.

Q. Now, do you recognize any of the signatures on this complaint?

A. The only signature I recognize is Helfant. I don't know Hick's signature, Summerson's signature. I never saw Hicks in my life until about five weeks ago. I don't know who this man is, Parri. I don't even know what the name is. I never saw that before.

Q. And whose signature is it over the line, "Witness as to Eugene Summerson"?

A. That's Edward Helfant.

Q. Have you seen Helfant's signature before?

A. Oh, yes, I had a copy of it. I went to the bank about a month ago, they had just cashed a check of his. I had a photocopy made of it. It disappeared somehow or other, but that's his signature.

Q. Judge, is there any doubt in your mind that that's Mr. Helfant's signature?

A. No doubt at all.

Q. Again, Judge, for the record, this complaint says, "Returned 9/10/68." Do you recognize the printing, "Returned"?

A. No, sir.

Mr. Joseph told me he wrote that.

Q. Is that your printing?

A. No, sir.

Q. Did you give the complaint back to Mr. Joseph on 9/10/68 and tell him to enter a dismissal on the docket?

A. No, sir; no, sir.

Q. Judge, would the fact that Mr. Joseph testified under oath before this grand jury, that in June of '68 you authorized him to write on Exhibit 1, "We do hereby withdraw the within complaint

against John Cantoni", that subsequently you said you were taking it to the prosecutor's office, that subsequently he asked you in July what happened to the complaint and you told him you had forgotten about it, you were going to get authorization, and that on September 10, 1968 you returned the complaint to him and told him that the signatures on the left-hand side were from the Atlantic County Prosecutor's Office that authorization had been granted to dismiss the complaint and that he was to enter a dismissal on the docket.

Would that testimony or my representation that that was Mr. Joseph's testimony on the record, refresh your recollection as to any of the events you testified about?

A. That's a deliberate lie.

Q. Does that representation as to Joseph's testimony refresh your recollection?

A. I can't—no, no recollection, no refreshing necessary. That is a lie because I never saw these papers until August of 1972.

Q. So, in other words, in spite of what Mr. Joseph had indicated and in spite of what you told us about Mr. Joseph being a good clerk and truthful man as far as you knew, it's now your contention he purjured himself before the grand jury?

A. He certainly did;

whereas in truth and in fact the said Samuel Moore in 1968 did have knowledge of and did participate in the disposition of the aforesaid complaint, that is, the said Samuel Moore knew of the existence of the aforesaid complaint in 1968, did direct Adolph Joseph to make certain writings on the back of the complaint, did in fact take the

complaint from the Municipal Court for the City of Egg Harbor City, did tell Adolph Joseph that approval had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and did authorize the dismissal; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VI

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury, which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-1), and which investigation the grand jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Edwin H. Helfant was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the foreman thereof, the said Edwin H. Helfant then and there taking the oath that the evidence which he should give

to the State Grand Jury should be the truth, the whole truth and nothing but the truth, and the foreman then and there having competent authority to administer such oath to the said Edwin H. Helfant in that behalf.

3. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into how and under what circumstances a signature purporting to be that of William H. Hicks was placed upon a certain release, dated June 7, 1968, which discharged John Cantoni from any claim, or claims, or causes of action emanating from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey, in 1968.

4. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, that the aforementioned release was signed in his presence on June 7, 1968 by William H. Hicks, as follows:

Q. I show you State Grand Jury Exhibit No. 11.
A. Yes, sir.
Q. Do you recognize that document?
A. Yes, sir.
Q. And what is that document?
A. It's a release that I prepared.
Q. Did you dictate it?
A. I don't know if I dictated it or I told Jane to prepare a release and gave her the terms.
Q. Well, most of it is kind of formal?
A. Yes, it's a formal release.
Q. "And more particularly from any claim or claims or causes of action whatsoever, emanating

from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey on the day of , 1968."

Did you dictate that language?

A. Could be, or else Jane put it in there on her own. I mean, she knows how to prepare a release.

Q. She would have access to this information?

A. I would have given her the date and told her what, and she would have just prepared it.

Q. And did Hicks sign this release in your presence?

A. In my presence and in the presence of Jane Durham (D-u-r-h-a-m).

Q. And this is the 7th day of June?

A. Whatever date is on that instrument is the date it was signed.

Q. Well, see, if the 7th day of June—

A. 7th day of June. And that's filled in by Jane.

Q. So this must have taken place at your office?

A. Yes;

whereas in truth and in fact, the said Edwin H. Helfant then and there well knew that the release was not signed in his presence on June 7, 1968, by William H. Hicks and the signature on the release which he was shown in the grand jury was a forgery; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of

Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired whether he had affixed his signature to the back of a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, over a typed line reading: "Witness as to Eugene Summerson".

3. In reference to the aforementioned matter under inquiry the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that the signature he was being questioned about was not his, as follows:

Q. I show you a signature under which is typed "Witnessed as to Eugene Summerson", and I ask you if you recognize that signature?

A. I do not, sir.

Q. Mr. Helfant, is that your signature?

A. No. This is not my signature.

Q. Are you absolutely certain of that?

A. One hundred percent certain. On my life, that's not my signature;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that the signature on the back of the aforesaid criminal complaint over the typing

State of New Jersey Indictment

"Witness as to Eugene Summerson" was his signature; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VIII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into if he ever had a discussion in 1968 with Richard Cantoni, also known as Babe, at the Green Lantern Motel about dropping the criminal charges against John Cantoni in return for the payment of a sum of money.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and gave in evidence testimony in the effect that he never met Richard Cantoni, also known as Babe, and never had any discussion with him about the criminal charges pending against John Cantoni, as follows:

State of New Jersey Indictment

Q. Any discussion with Babe Cantoni about this case?

A. Do not know Babe Cantoni.

Q. Any discussion with a man who came to you at the Green Lantern?

A. Nobody ever came to me at the Green Lantern.

Q. If I were to tell you that Babe Cantoni has indicated that he came to you and discussed with you how much you wanted to drop the charges and you said $5,000.00 or Cantoni will go to jail, does that refresh your recollection?

A. That would have been an untrue statement because it never happened.

Q. Never happened?

A. Never happened.

Q. Never saw Babe Cantoni?

A. Don't know Babe Cantoni.

Q. Just know his name?

A. Only from what Mr. Lipman told me, that he represented the vending machine company and that this is how he got into the case, that's the only time I heard the name Babe Cantoni.

Q. You are absolutely certain that Babe Cantoni never came to you and asked you how much money you wanted to drop the charges?

A. Absolutely certain;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he had met with Richard Cantoni, also known as Babe, at the Green Lantern Motel in 1968 and had discussed with him the dropping of criminal charges against John Cantoni for atrocious assault and battery in return for the payment by John

State of New Jersey Indictment

Cantoni of a sum of money to Edwin H. Helfant; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT IX

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into whether Edwin H. Helfant ever met with Shelly Kravitz and discussed with him the dropping of criminal charges against John Cantoni in return for the payment of money to Edwin H. Helfant.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that he never met with Shelly Kravitz and had discussions with him about the criminal case involving John Cantoni, as follows:

Q. Do you know a man by the name of Shelly Kravitz?

A. Yes, sir.

State of New Jersey Indictment

Q. How long have you known Kravitz?

A. I would say about seven or eight years.

Q. Did you ever have any discussion with Shelly Kravitz about this case?

A. Absolutely not.

Q. A day or two after that beating or this injury to Mr. Hicks, did you call Mr. Kravitz and tell him you wanted to see him in your office?

A. Absolutely not.

Q. When Kravitz first came to see you in your office, did you tell Kravitz that Cantoni had to get some money up or you would go to quote "Personally prosecute the case"?

A. Kravitz never came to my office. And I never discussed this case with him.

Q. Did you ever tell Shelly Kravitz or anybody else you were going to "personally prosecute this case", before Judge Moore, unless Cantoni came up with the money?

A. Not alone didn't I say that, it wouldn't be possible.

Q. I don't particularly care whether or not that was possible. Did you or did you not say that?

A. I never said any such thing, never discussed this case with Shelly Kravitz at all.

Q. Did you tell Shelly Kravitz in a subsequent conversation, unless Cantoni came up with the money you were going to see he was going to be put in jail?

A. I never said any such thing.

Q. That would have been extortion?

A. I don't know about extortion, it would have been an improper statement.

State of New Jersey Indictment

Q. It would be compounding a felony, wouldn't it?
A. Most likely;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he did meet in 1968 with Shelly Kravitz and had discussions with him about the dropping of criminal charges against John Cantoni for atrocious assault and battery against William H. Hicks in return for the payment of a sum of money; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

EVAN WILLIAM JAHOS,
Assistant Attorney General and
Director of the Division of
Criminal Justice

A TRUE BILL:

CARL F. PENNIPEDE,
Foreman